Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

BILLIE RENEE BAILEY,
Petitioner,

v.

CLAY COUNTY, ALABAMA, SHERIFF RALPH TOLAND, individually, and FRANK THREATS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate court has held that the constitutional rights of an inmate are not violated by a jailer who misused his position by having sex with a female inmate who was incarcerated and under the jailer's control.

2. Whether the Eleventh Circuit has so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when it continues a practice of issuing non-published opinions regarding the precedent necessary to warn an official and others as to when and under what condition the official may or may not be protected by the defense of qualified immunity.

3. Whether the Eleventh Circuit has so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when it sanctions the granting of summary judgment in favor of an agency of local government and a county sheriff, when they fail to provide the necessary funds, personnel, and practices to protect a pretrial detainee inmate with the minimum civilized measures of life's necessities and protection.

PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the provisions of Rule 14.1(b), the Petitioner represents to the Court that Rule 29.6 is not applicable to this proceeding. Also, all of the parties to the proceeding are named in the caption of the case.*

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* The name of one Defendant, Frank Threats, sometimes appears as "Frank Threat" in the documents. His actual name is Frank Threats, with the "s" appropriately at the end of his surname. (R1-134-31).

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CITATIONS OF OPINIONS AND ORDERS

The opinions of the United States District Court for the Northern District of Alabama are not reported, and are set out at Appendix B (App. 4a), Appendix C (App. 5a-32a), and Appendix E (App. 34a). The orders of that court denying rehearing are not reported, but are set out at Appendix D (App. 33a) and Appendix F (App. 35a-36a).

The opinion of the Eleventh Circuit Court of Appeals is not reported, and is set out at Appendix A (App. 1a-3a), and the decision of that court on rehearing is set out at Appendix G (App. 37a).

The Appendix thus includes the following:

A. Decision of the Eleventh Circuit to be reviewed (App. 1 -3a).

B. District Court judgment of September 16, 2003 (App. 4a).

C. District Court Memorandum Opinion of September 16, 2003 (App.5a-32a).

D. District Court order of October 30, 2003 (App. 33a).

E. District Court judgment of December 9, 2003 (App. 34a).

F. District Court order of January 8, 2004 (App. 35a-36a).

G. Decision of the Eleventh Circuit denying application for rehearing or rehearing en banc entered on March 16, 2005 (App. 37a).

H. Copies of Amendment VIII and XIV, Section 1, U.S. Constitution (App. 38a).

I. Copies of Ala. Code 1975 §11-12-15(a)(1); Copy of Ala. Code 1975 §11-14-13; Copy of Ala. Code 1975 §14-6-1; Copy of Ala. Code 1975 §14-6-7; Copy of Ala. Code 1975 §14-6-41(b); Copy of Ala. Code 1975 §14-6-95; Copy of Ala. Code 1975 §14-6-97; Copy of Ala. Code 1975 §22-3-5(3); (App. 39a-41a).

J. Copy of 42 U.S.C. §1983 (App. 42a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated on August 9, 2004 (App. 1a-3a), and the decision denying the Petition for Rehearing or Rehearing En Banc is dated on March 16, 2005 (App. 37a).

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1). Rule 10(a) of the Rules of this Court provides for review of a United States Court of Appeals' decision that has so far departed from the acceptable and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for the exercise of this Court's supervisory powers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. §1983 (App. 42a)

United States Constitution, FOURTEENTH AMENDMENT, Section 1 (App. 38a).

United States Constitution, EIGHTH AMENDMENT (App. 38a).

Ala. Code 1975 §11-12-15(a)(1) (App. 39a).

Ala. Code 1975 §11-14-13 (App. 39a).

Ala. Code 1975 §14-6-1 (App. 39a).

Ala. Code 1975 §14-6-7 (App. 39a-40a)

Ala. Code 1975 §14-6-41(b) (App. 40a)

Ala. Code 1975 §14-6-95 (App. 40a)

Ala. Code 1975 §14-6-97 (App. 40a)

Ala. Code 1975 §22-3-5(3) (App. 40a-41a)

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

This case is brought by the Plaintiff, Billie Renee Bailey (hereinafter known as "Plaintiff" or "Bailey"), a former detainee in the Clay County Jail, against Clay County, Alabama, Sheriff Ralph Toland, and Jailer Frank Threats to seek relief

under the Fourteenth Amendment of the United States Constitution and under 28 U.S.C. §1343, and 42 U.S.C. §1983 since the Defendants acted under the color of state law. (R1-1).

The Defendants Toland and Clay County filed Motions to Dismiss. (R1- 6,7). The Plaintiff filed an Amended Complaint (R1-27), with the Defendants filing Amended Answers. (R1-46,47,48).

The trial court bifurcated this case, so that Defendants Clay County and Toland and the claims of jail conditions and medical care would be heard separately from Defendant Threats and the alleged sexual contact between him and the Plaintiff.

Defendants Clay County and Toland filed a Motion for Summary Judgment. (R1-85). The Plaintiff responded to that motion (R1-97), and the trial court entered summary judgment for those Defendants on September 16, 2003. (R1-115). A timely post-trial motion under Fed. R. Civ. P. 59 was filed on September 30, 2003 (R1-116), which was denied on October 30, 2003. (R1-122). The Plaintiff filed her notice of appeal on or about November 28, 2003. (R1-124).

A trial was held on December 8 and 9, 2003 concerning the alleged sexual contact between the Plaintiff and Defendant Threats. A verdict was rendered in favor of the Defendant on December 9, 2003. (R1-129). A timely post-trial motion under Fed. R. Civ. P. 59 was filed on or about December 27, 2003. (R1-130). The Plaintiff filed her notice of appeal on January 14, 2004. (R1-132).

A Motion to Consolidate these two appeals was filed on or about January 20, 2004, and the court granted the motion on February 20, 2004. The Eleventh Circuit affirmed the lower court's decision on August 9, 2004 (App. 1a-3a), and a Petition for rehearing or Rehearing en banc was denied on March 16, 2004. (App. 37a).

(ii) Statement of Facts *(noted by the district court)[1]

The Defendant Toland was at all relevant times the Sheriff of Clay County, Alabama. Plaintiff Billy Renee Bailey ("Bailey") was incarcerated at the Clay County Jail ("the Jail") beginning on November 30, 1999, and she was released on January 18, 2000. Bailey alleged violations of 42 U.S.C. §1983 as a result of a sexual assault and unconstitutional conditions at the Jail and denial of medical care while incarcerated.

Bailey asserted that although the Jail was built to house 24 inmates, at the time of her incarceration the inmate population was averaging about 61 inmates per day. Bailey was given a mattress and sheets for her bed. She also contended that the overcrowding problem was reported by local news sources. Defendants contended that Bailey herself admitted that often she only had one cellmate, and at times she had the entire cell to herself. At one point Bailey did have a cellmate that was present only on weekends. At another point Bailey did mention sharing her cell with four or five other inmates, but that was apparently for one weekend only. With the exception of one evening in which Bailey was in a cell that had no bunk, she slept in her own bunk every night.

In her supplemental brief, Bailey alleged that Toland knew of the overcrowding of the jail facility based on an August 1999 grand jury inspection in which Toland assisted. Also, Toland admitted to discussing the overcrowding problems with the County Commission but did not put anything in writing because he wanted to work with the Commission on a "personal level." Toland apparently never applied to a judge

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[1] With only minor variations or editing, the first portion of this Statement of the Facts is taken from the trial court's recitation of the facts found in its Memorandum Opinion and Order therein supporting its entry of summary judgment. *See* R-114-1 through 11. Also, references to Exhibits have been omitted.

to rectify the crowding problems. As to Clay County, Bailey argued that County Commissioner John Wheeles testified as to awareness of the "crowded" condition of the Jail in June 1999. According to Bailey, the County Commission also knew of the overcrowding problem from a grand jury inspection that informed the County that the problem should be eliminated.

Significantly, Toland contended that the evidence demonstrates that there never were significant or sustained overcrowding problems in the female cells. Toland testified that from 1998 to 1999 the female inmate population declined over fifty-percent[2] but the male inmate population in the male cells increased, particularly in the upstairs cells which housed only male inmates. Toland further testified that this increase could largely be explained by the presence of state prisoners which the Department of Corrections refused to accept.[3] Furthermore, Toland argues, he was doing all he could to encourage the Department of Corrections to take these excess inmates.

Similarly, Clay County alleges that the County Commissioners like John Wheeles only knew about crowding problems in the upstairs, male-only section of the jail. According to Clay County, in recognition of its duties to fund new jail facilities or renovate old ones, the County sought more funding for the jails through local acts in the state legislature.

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[2] According to Toland, during 1998, 101 female inmates were incarcerated in the Clay County Jail, and during 1999 (the period of Bailey's incarceration), 50 female inmates were incarcerated there.

[3] Health Department Inspector Rusty Miller confirmed the overpopulation in the upstairs portion of the jail but could not recall any problem with overcrowding in the female cell area. See Ex. 5, ¶ 15.

Bailey described the food at the Jail as "inedible," salty,[4] often containing foreign objects such as human and cat hair and other dried food, and lacking variety ("You were served the same thing every day"). Bailey did not like what the Jail was serving and quit eating at one point until a kitchen employee began to make her grilled cheese sandwiches. She eventually tired of that meal as well. Bailey contends that another inmate suffered food poisoning, but apparently neither Toland nor Jail Administrator Studdard were ever aware of food contamination incidents. Health Inspector Rusty Miller also stated that he had not been made aware of complaints of contaminated food being served or of food poisoning.

The Jail's policy was to serve inmates three well-balanced meals each day. The Jail Administrator placed store orders (including orders for bread, meats, poultry, fish, canned/dried items, and other general food/supplies) based upon detailed lists and accounting of the needed items and number of those items remaining in storage. Kitchen trusties prepared the food and were required to wear hairnets and gloves. Trays and utensils were gathered after each meal, when trays were cleaned and rinsed before being placed in a high-steam sanitizer. Cups issued to inmates upon their incarceration could be kept by inmates for use throughout the day.[5] The Jail gave inmates soap and detergents to keep their cups clean. All meal-time drinks were poured from a common tea or water pitcher into each inmate's cup.

When Mr. Miller inspected the kitchen in December 1999, it received a rating of 89, which Defendants asserted is acceptable. According to Defendants, the few deductions that were taken had nothing to do with the Jail's food protection

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[4] Bailey stated that the saltiness of the food was health risk since she had been prescribed a low-sodium diet by a physician.

[5] Inmates could keep cups from home if they wished.

measures. The Defendants also note that the score of 89 showed improvement from the two previous inspections, where the kitchen received scores of 87 and 88 on June 2, 1999 and September 29, 1999, respectively.

During his December 1999 inspection, Miller noted no deficiencies in the following areas: food, food protection, personnel (hygiene), water, sewage, garbage/refuse disposal, pest control, kitchen ventilation, dressing rooms, and miscellaneous areas. Miller found that all food protection measures such as temperature control, thawing, and storage met the requisite standards. Further, the hygiene of the food handlers and preparers, food disposal, and water sources met the requisite standards. The deficiencies noted in Miller's December 1999 inspection involved the tabletop surface upon which foods were prepared, some plumbing maintenance, broken areas of the floor and wall, and the shielding of light fixtures.[6] The largest number of points deleted (4) was based on having no separate locked bathroom facility for each trusty cell.[7]

The Jail's policy was to provide medical attention upon any inmate's written or oral request. In an emergency situation, the inmate was to be transported to the emergency

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[6] Consistent with Bailey's allegations, Clay County health reports mentioned roaches and the refrigerator temperature in the Jail. The June, September, and December 1999 health reports all mention eliminating roaches. Although the June 1999 health report noted the need to repair or replace the refrigerator since it did not operate at the proper temperature, both the September and December 1999 health reports stated: "two refrigerator/freezers have been replaced." See Def. Ex. 12-14.

[7] Health Inspector Miller testified that the bathroom facility is located a few feet down the hallway from the trusty dorm and within ten yards of the kitchen. According to Miller, the inspection report noted this deficiency because the bathroom facility is not more conveniently accessible within the trusty dorm area itself, and the deduction was made because trusties work in the kitchen. See Ex. 5, ¶ 12.

room or the Clay County rescue squad would be called. For non-emergency situation, the inmates are generally scheduled for the first available appointment at the Clay County Medical Clinic. It was also the policy of the Jail to provide inmates with any and all medications brought with them to the Jail or prescribed to them during their incarceration. The Defendants contended that Bailey was familiar with the procedures, as she filled out a medical request form for her cellmate, Kerrie Baker. Both Toland and Studdard stated that, to the best of their knowledge, Bailey received care and /or medication every time that she requested it.

Bailey was booked into the Jail on November 30, 1999 at 8:30 p.m. by Jailer Joshua Gregg ("Gregg"). Bailey signed the booking sheet[8] which indicated that she had given all information "concerning [her] health during this medical screening." Bailey indicated that she suffered from (1) mental illness, for which she took Xanax and Paxil, (2) hypertension, (3) back trouble, and (4) a venereal disease (genital herpes). On December 1, 1999, Jail staff contacted Bailey's treating physician upon her claim that she was suffering a panic attack. The medical records reflect that an "okay [was] given to Clay County jailer for pt [patient] to have additional 1 mg Xanax in event of panic attack per Dr. Chafe." [9] Bailey asserts that she suffered her first panic attack at the jail; however, the Defendants contend that Bailey had a past medical history of panic attacks.

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[8] A twenty-five question checklist concerning various health issues accompanied this medical statement. A "yes" was marked for history of suicidal tendencies and strange behavior at the time of incarceration. Def. Ex. 17.

[9] In her supplemental brief in the trial court Bailey noted that on various occasions her requests for medication were denied. On one particular occasion, Bailey alleges, she asked her jailer, Defendant Frank Threats, to bring her Aleve for fever, but he raged and reached for his mace. There was no evidence that Toland was aware of that incident.

Five days later on December 6, 1999, Bailey asked Gregg to arrange for her to see Investigator Jean Dot Alexander because she said she could "smell . . . semen" when she urinated. Investigator Alexander came to the Jail to meet with Bailey, who stated that someone had sex with her. Alexander began an investigation into the complaint and transported Bailey to the Clay County Hospital. The doctors detected semen, bruising on Bailey's shoulder, thigh, and breasts, and teeth marks on her breasts.

Bailey contends that she could not remember anything about the incident until the next day, and she believes that she was drugged because she had no memory and slurred speech. However, the doctor's notes from Bailey's trip to the emergency room state: "NAD [no apparent distress], alert, speech is clear." According to Toland, all of these records are devoid of any mention of Bailey being drugged. No drug screening was ordered, and Bailey herself admitted that no one has actually ever told her that she was drugged.

The Clay County Hospital performed a number of tests on Bailey, including a urine HCG pregnancy test, which was positive, and a rape kit. Because the urine HCG test was positive, a serum or blood HCG test (beta HCG) was also performed. The result of the latter test was 1, and the Defendants contend that any number less than 5 is considered a negative test for pregnancy. As Bailey had already left the hospital when these results came back, a nurse called the jail and informed Jailer Leroy Brown that the test was negative, specifics about Bailey's medication, and that Bailey should see her "OB doctor ASAP."

Later that same night, at 10:15 p.m., Bailey was readmitted to the hospital to "R/O [rule out] ectopic pregnancy." Bailey had an ectopic pregnancy before, prior to her tubal ligation, and she was concerned that she may have another one because of the alleged rape. An ultrasound was performed which found no "evidence of intrauterine pregnancy

identified," although it did not rule out such a possibility because it may have been too early to tell. Bailey was taken back to the hospital on December 8 and 10 for follow-up HCG tests, but it was determined on December 10, 1999 that no further treatment was needed. The December 10th test confirmed she was not pregnant. The Defendants asserted that the evidence shows that Bailey, even if she was pregnant, could not have become so as a result of the alleged rape.

Bailey states that she miscarried "six days" after the alleged assault. She further alleges that Jailers Jason Gentry and Leroy Brown refused her request to taken to the doctor after she noticed spotting; instead, Gentry "ignored" her and Brown "snickered at [her] when he walked past and he wouldn't stop." Defendants counter that Brown was not on duty on December 11 or December 12, 1999. Defendants also again contend that the weight of evidence suggests that Bailey was not ever pregnant, and thus could not have miscarried. Furthermore, Defendants contended that Bailey could not show that the problems she suffered after leaving the jail are attributable to events that occurred at the jail.

Bailey also contended that she began suffering from the flu and requested medical attention, and that it was three or four days before someone took her to the doctor, even though she had been asking for medical care the entire time. On December 29, 1999, Bailey was taken to the Clay County Medical Clinic. Bailey was prescribed cough medicine, an antibiotic, and anti-nausea medication. According to jail logs, Bailey took the entire course of cough and antibiotic medicines but refused to take the anti-nausea medication. According to Toland, on December 29, 1999, Bailey complained of flu and was examined by Dr. Hensleigh of the Clay County Medical Clinic. No evidence indicates that Bailey complained to Hensleigh of having flu symptoms for several days or suspecting a miscarriage.

Finally, on January 4, 2000, Bailey was taken to the emergency room with a complaint of right knee pain.[10] Medical records show that Bailey refused aspiration of her knee, which was swollen with "joint fluid." She was given prescription strength Motrin and released back to the jail with a final diagnosis of arthritis. *Id.* Toland contends that Bailey made no other medical requests or complaints until the time of her release on January 18, 2000.

Bailey contends that all of these requests were only made to a jailer because Defendant Toland refused to see her after she made several requests for a conference with him. Bailey testified, "[W]hen you asked to be taken to the doctor...they wouldn't take you or they would ignore me. When you asked why was your medication late, they would ignore you." Bailey admitted she never talked to Toland personally. Toland testified that he never received any oral or written complaint from Bailey concerning any condition within the jail that was causing her to suffer, including any alleged denial of medical treatment. Toland did however learn about the alleged rape soon after it supposedly occurred.

(iii). Facts not included in the District Court's Findings[11]

As to the facts concerning Appellee Threats, he was employed by Sheriff Ralph Toland in the position of jailer. (R1-134-32). He mainly worked at night from 8 p.m. to 8 a.m. (R1-134-32). Appellee Threats was instructed to "stay physically away from" the inmates. (R1-134-33). A part of his duties was to check the cell sheet listing and number of

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[10] On this occasion, Bailey alleges, she was denied medical treatment for her knee injury for three or four days.

[11] The remaining facts are taken from the transcript of the testimony at the trial of the course, with appropriate reference to that transcript, and from other evidence as indicated.

inmates, booking sheets, and to prepare inmates medication.(R1-134-34).

Prior to the night in question, Bailey and Threats had conversations about family, military, jailer schedules and, according to Threats, sexual conversation, also. (R1-134-36,37). Yet, Bailey could not remember what conversations that she had with Threats. (R1-134-87).

On December 5, 1999, between 8:00 p.m. and 10:00 p.m., Threats admitted that he and Bailey had engaged in sexual contact in the bathroom of the jail. (R1-134-42). Bailey, however, could not recall anything that occurred at that time (R1-134-88), however, the next day, she discovered semen in her underwear along with marks and bruises on her body. (R1-134-88,89). The Appellee Threats was off-duty for four days after that incident. (R1-134-45).

Threats was ordered not to have any physical contact with female inmates (R1-134-33). Although he had been told specifically to stay away from Bailey (*Id.*, p. 40), he admitted that he got a key and unlocked and opened Bailey's cell door and pointed for her to go toward the office (*Id.*, p. 41), and then pointed for her to go into the bathroom, where he then told her to turn around so he could have sex with her. (*Id.*, p. 42). He stated that she dropped her shorts there and that he had sex with her. (*Id*). Threats then said he made sure the hallway was clear and told her to come out and go back into her cell, and he locked the cell door behind her. (*Id.*, p. 43). Threats admitted that his conduct was inappropriate (*Id.*, p. 45), and that he tried to conceal the fact that he had the sexual encounter, but finally admitted it when he was subjected to a DNA test. (*Id.*, pp. 45-47).

Upon returning to work, Threats and Bailey engaged in a conversation concerning the night of December 5. Threats told Bailey that he did not know what happened. (R1-134-45,90). After an investigation by the Clay County Jail and the

FBI. Threats admitted to having sexual relations with Bailey. (R1-134-47). As a result of Threats' conduct, he was terminated from his position as a jailer (R1-134-48). The events of December 5 caused Bailey to have various medical conditions, such as panic attacks, (R1-134-91-93). The Appellant had an extensive medical history prior to incarceration and extensive legal issues. (R1-134- 94-100).

In its review of the evidence relating to Clay County and Sheriff Toland, the trial court seemingly focused upon items that tended to minimize the effect of the omissions of those Defendants. Actually, the relevant health reports recorded that some very serious conditions existed at the jail, including the following:

1. Plumbing in poor repair.
2. All cells should have commode, lavatory should be provided with temperate water. Trustees go to a toilet and shower in a common toilet on the main hall.
3. Beds too close together to each other. Infectious diseases could be transmitted to other inmates.
4. Walls should be in good repair.
5. Tea containers should be of approved construction.
6. The kitchen hood needs filters and a fan in hood.
7. Eliminate Roaches.
8. Refrigerator not proper temperature. Should be repaired or replaced.
9. Clean toilets and showers.
10. Provide adequate ventilation.

11. *Eliminate overcrowded conditions.*[12]

12. Clean hallway and remove unnecessary items from cells.

(R1-86-Ex. 12, 13, 14).

Other conditions that appeared in the reports were:

Eliminate unnecessary items outside of jail.

Repair roof to eliminate water from collecting in light fixture.

Replace all the mattresses that are in poor condition.

Light fixtures in kitchen should be shielded.

Garbage cans should have tight fitting covers.

All floors should be kept clean.

(R1-97-17, 18).

The repeated reference to the same violations in the corrective reports is clear evidence that Sheriff Toland and the Clay County Commission were deliberately indifferent to those inadequacies. (R1-97-17, 18).

The health reports also cautioned that "[t]ime and abuse have severely deteriorated the plumbing, plumbing fixtures, electrical systems, showers, ventilation systems, and heating systems." (*Id*). The filth made it very difficult for the Plaintiff, whose cell was so dirty it could not be cleaned with customary cleaning material, and the shower curtain was covered with mildew. (*Id*). The jail was infested with roaches, spiders, and lice, and the Plaintiff found roaches on her body when she would awaken in the mornings, and was infested with lice when she was released from jail. (*Id*). A jailer brought a live snake into the jail to terrorize inmates (*Id*., p. 5), and a dirty cat was allowed to roam in the cell area

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[12] The trial court observed that the overcrowding affected the male prisoners only. (R1-114-3) (App. 7a).

and in the food area at the jail. (*Id*). Food would come to Bailey "with hair in it." (R1-97-13).

The evidence is clear that Sheriff Toland knew that he needed more staffers, and that he had made that need known to the individual members of the County Commission. (R1-97 Toland depos., p. 37). On the night of the sexual encounter, Threats was the only jailer present, and if he had been appropriately paired with another jailer it seems obvious that the sexual encounter would have never occurred. *Id.*, p. 40.

The sexual encounter obviously could have been avoided if the Defendant Toland and the County Commission had provided adequate back-up staffing or surveillance methods to have exposed the efforts of Defendant Toland on the night of December 5, 1999. The lack of attention to impending dangers are matters of constitutional import, and the failure to provide adequate staffing and protection procedures to insure such attention are constitutionally prohibited. See *Newman v. State of Alabama*, 503 F. 2d 1320, 1321 (5th Cir. 1974).

At the conclusion of the evidence taken in the trial involving Threats, at page R1-134-173 the Court gave the following instruction:

> Now you are not, in this case based on the evidence in this case, you are not to decide one way or the other as to whether it is or is not appropriate for a jailer to have sexual relations with an inmate. That is not the basic issue. The issue is is whether or not was or was not with consent.
>
> You cannot decide the case just based purely on the basis that you just don't think it's appropriate for a jailer to have sexual relations with an inmate. But you should carefully consider as to whether it was with consent or without consent, considering the totality of the circumstances.

After all testimony was given, all evidence presented, and jury instructions given, the jury deliberated and rendered a verdict in favor of the Defendant Threats, on December 9, 2004. (R1-134-183; R1-129).

ARGUMENT

1. A jailer should be liable for having sexual contact with an inmate under his control.[13]

As to the jury instructions that the lower court gave prior to deliberations, the instructions were flawed in that the jurors were only to review whether the sexual contact was consensual or not. The jurors were not allowed to consider that Threats was in a position of authority over the Appellant.[14] It is true that some courts have held that while "consensual conduct may violate municipal policy, it carries no constitutional implication." *Stockman v. Lowndes County, Mississippi*, 2000 WL 33907696 (N.D. Miss. 2000). The Eighth Circuit has held that "welcomed and consensual sexual contact between inmates and prison personnel does not violate the Eighth Amendment." *Freitas v. Ault*, 109 F.3d 1335, 1339 (8th Cir. 1997).

In this case, there was a special relationship between the inmate and Jailer Threats. It is held that the "state's duty to protect those persons or to provide services for them arises

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[13] In this case, Bailey was a pre-trial detainee during her incarceration. As such, she was entitled under the Fourteenth Amendment to the same protections that are accorded to convicted persons under the Eighth Amendment. *Lancaster v. Monroe County, Alabama*, 116 F. 3d 1419, 1425 n. 6 (11th Cir. 1997); *Hamm v. DeKalb County*, 774 F. 2d 1567, 1573 (11th Cir. 1985). In fact, a pretrial detainee enjoys even more protection than a convicted person, because an inmate who has not been convicted may not be punished. See *Hamm*, supra.

[14] Clay County Jail rules provided that an inmate may be disciplined for "refusing to obey an order of any staff member." (R1-85, Defendant Ex. B).

from the custody or control." *Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998). Within this special relationship, the various circuits have followed the concept that "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Kitzman-Kelley v. Warner*, 203 F.3d 454, 459 (7th Cir. 2000), *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996). There are circumstances in which a "state had a duty to act on behalf of those with whom it had a special relationship." *Kitzman-Kelley* at 459-460; see also *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Parham v. J.R.*, 442 U.S. 584, 619 (1979); *Estelle v. Gamble*, 429 U.S. 97, 103-105 (1976); *Jackson v. Byrne*, 738 F.2d 1443, 1446-1447 (7th Cir. 1984).

It is often stated "that the use of excessive force against a prisoner can violate the Eighth Amendment, and that 'the unnecessary and wanton infliction of pain. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Smith v. Cochran*, 339 F.3d 1205, 1212 (10th Cir. 2003), quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Hudson v. McMillian*, 503 U.S. 1, 5-6 (1992). The Tenth Circuit has held that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards." *Cochran* at 1212, quoting *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993). This constitutional right includes the right to be protected from sexual abuse. *Id.*, *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998). The Second Circuit has held that "[s]exual abuse of a prisoner by a corrections officer has no penological purpose, and is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.*, *Boddie v. Schnieder*, 105 F.3d 857, 861 (2nd Cir. 1997). A prison guard or jailer employed by the state can be liable under the Eighth Amendment for using excessive force against prisoners in the form of sexual abuse." *Id.* at 1215, *Barney* at 1310.

Since there is a special relationship between a jailer and a prisoner, the Defendants should have known, without excessive training sessions, that Bailey should have been protected from the sexual encounter with Threats. Threats is liable under the Fourteenth Amendment for the actions that occurred, and the instructions by the trial court should have covered the special relationship between the two parties. Therefore, the jury instructions were inadequate and those instructions that were given were misleading, and caused prejudicial harm to the Appellant.

The Eleventh Circuit decision dealt briefly with the sexual encounter itself by stating (App. 2a-3a):

> "Second, Bailey contends that the district court erred by not instructing the jury that she was incapable of consenting to sexual intercourse with Jailer Threats because of the special relationship of authority that Threats had with her, an inmate. . . .[15] Here, Bailey points to no legal authority in support of her position that all jailer-inmate sex is nonconsensual. And, the instruction that the district court gave comports with the law of all other circuits which have considered whether consent is a defense to an inmate's charge that a jailer raped her."

In holding in a non-published opinion that consensual sex between a jailer and an inmate does not involve a constitutional infringement, the Eleventh Circuit avoids advising litigants by clearly established law whether such a jailer is entitled to a defense of qualified immunity. In an earlier case

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[15] The Eleventh Circuit opinion also asserted that Bailey did not submit such an instruction or distinctly object to the trial court's failure to give such an instruction. However, it was crystal clear from the record that counsel for Bailey urged the position that sexual intercourse between a jailer and an inmate was forbidden, and that the trial court would not accept that position(R1-134-129), and that the trial court recognized that the objection was proper and that it was well understood. (R1-134-179).

of *Adair v. Department of Community Affairs*, 02-1575011 (August 14, 2003), this Court tacitly sanctioned another non-published opinion essentially holding that reprisals against a daughter because of her relationship with her own mother did not violate clearly established constitutional law. The Petitioner here has moved under Eleventh Circuit Local Rule 36.3 and I.O.P.-5 to have the Eleventh Circuit publish this opinion so that lawyers and potential litigants might be advised of such holding.

2. The Liability of Sheriff Toland and Clay County

The trial court granted summary judgment in favor or Sheriff Toland and Clay County by concluding that the evidence did not show that Bailey suffered any injury from overcrowding or from inadequate service. (R1-114-26). (App.31a-32a). As to Toland, the trial court also concluded that he was protected by the defense of qualified immunity. (*Id*).

Even though the trial court minimized the effect of inadequate jail conditions, the health reports revealed significant deficiencies, including the following:

1. Plumbing in poor repair.
2. All cells should have commode, lavatory should be provided with temperate water. Trustees go to a toilet and shower in a common toilet on the main hall.
3. Beds too close together to each other. Infectious diseases could be transmitted to other inmates.
4. Walls should be in good repair.
5. Tea containers should be of approved construction.
6. The kitchen hood needs filters and a fan in hood.
7. Eliminate Roaches.

8. Refrigerator not proper temperature. Should be repaired or replaced.

9. Clean toilets and showers.

10. Provide adequate ventilation.

11. Eliminate overcrowded conditions.[16]

12. Clean hallway and remove unnecessary items from cells.

Other conditions that appeared in the other reports were:

Eliminate unnecessary items outside of jail.

Repair roof to eliminate water from collecting in light fixture.

Replace all the mattresses that are in poor condition.

Light fixtures in kitchen should be shielded.

Garbage cans should have tight fitting covers.

All floors should be kept clean.

(R1-97-17, 18). The health reports also cautioned that "[t]ime and abuse have severely deteriorated the plumbing, plumbing fixtures, electrical systems, showers, ventilation systems, and heating systems." (*Id*). The filth made it very difficult for the Plaintiff, whose cell was so dirty it could not be cleaned with customary cleaning material, and the shower curtain was covered with mildew. (*Id*). The jail was infested with roaches, spiders, and lice, and the Plaintiff found roaches on her body when she would awaken in the mornings, and was infested with lice when she was released from jail. (*Id*). A jailer brought a live snake into the jail to terrorize inmates (*Id*., p. 5), and a dirty cat was allowed to roam in the cell area and in the food area at the jail. (*Id*). Food would come to Bailey "with hair in it." (R1-97-13).

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[16] The trial court observed that the overcrowding affected the male prisoners only. (R1-114-3) (App. 7a).

Sheriff Toland contended that he was not responsible for the intolerable living conditions that existed at the jail, and that it was "almost impossible" for him to keep "the current facility safe and clean," because the county had not provided him with the funds to employ the staffing or security or surveillance equipment necessary to provide inmates with a safe environment. (*Id.*, p. 7).[17]

While Sheriff Toland denies any knowledge of Bailey's repeated requests for medical attention, Bailey contended that she repeatedly asked for a conference with Toland to complain about the lack of medical attention, but he never granted her an audience. (R1-114-10, 11).

It was established that the sexual encounter occurred between midnight of December 5 and 6 a.m. on December 6, 1999, while the Defendant Frank Threats was the only jailer in attendance, and while there were no back-up or safety or warning or surveillance measures available for the protection of the Plaintiff. (*Id.*, p. 4). The sexual encounter probably would not have occurred had two jailers been on duty. (R1-77-4, Ex. A, p. 76). It is therefore clear that the lack of staffing, resulting from inadequate funding, contributed to Threats's opportunity to carry out the sexual encounter. The usual practice of the Defendant Toland was to have two guards or jailers on duty at all times to insure the safety and protection of inmates. (*Id.*, p. 3).

It is now axiomatic that it is "but just that the public be required to care for a prisoner, who cannot by reason of the deprivation of his [her] liberty, care for himself." *Estelle v. Gamble*, 429 U.S. 97, 104 (quoting *Spicer v. Williamson*, 191 N.C. 487, 490 [1926]). However, in Alabama, sheriffs are responsible for inmate care, and the duties of the counties

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[17] There should be no question in this case about the awareness by the Defendants of the inadequate jail conditions, because there was wide publicity concerning those conditions. (R1-97-5).

"are limited to funding the operation of the jail and to provided facilities to house the jail." *Turquitt v. Jefferson County, Alabama*, 137 F. 3d 1285, 1289 (11th Cir. 1998); *Stark v. Madison County*, 678 So. 2d 787 (Ala. Civ. App. 1996). The Alabama Legislature has also imposed specific requirements upon the counties regarding the establishment, upkeep, and conditions of their jails. See, e.g. Ala. Code 1975, §11-12-15(a)(1) and §11-14-13. (App. 39a-41a). Alabama law places also upon sheriffs the strict responsibility of providing a safe environment for prisoners. See Ala. Code 1975, §14-6-1, §14-6-7, and §14-6-97. (*Id*).

In *Marsh v. Butler County, Alabama*, 268 F. 2d 1014 (11th Cir. 2001), it was held that a county can be directly responsible for a constitutional violation due to its acts or omissions in failing to provide adequate jail safety, and even when conditions only impose a significant threat to the safety of inmates.

The Eleventh Circuit panel noted that it affirmed the granting of summary judgment in favor of Sheriff Toland based upon his qualified immunity defense (App. 32a). In order for a court to deprive an official of the protection of qualified immunity, it must be ascertained that the official, acting within his discretionary authority, violated "clearly established law." In applying that standard, it is not necessary to show that the specific action has been held to be unlawful, but the unlawfulness must be apparent in the light of pre-existing law. See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12 (1985).

Under existing law, Sheriff Toland had no discretion involving his duty to adequately care for and protect Bailey, and that factor alone strips him of access to the defense of qualified immunity. See *Lee v. Ferraro*, 284 F. 3d 1188, 1193-94 (11th Cir. 2002).

The qualified immunity defense has been denied in view of cases holding that punishment of pre-trial detainees violates due process principles. See *Johnson v. Breeden*, 280 F. 3d 1308, 1320 (11th Cir. 2002). This period of confinement was filled with incidents that could be considered punishment. For example, the district court identified one night where the Plaintiff was placed in a cell with no bunk at all to sleep on as a form of punishment. (R1-49-2).

For the reasons stated, neither Sheriff Toland nor Clay County were entitled to the issuance of summary judgment because there were significant and prevailing issues of material fact as to the conditions existing at the jail. See *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). Also, Sheriff Toland is not entitled to an award of summary judgment based upon his qualified immunity defense.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be issued and the this cause should be remanded to the courts below requiring them to revisit the issues presented, in order to correct the errors enumerated.

Respectfully submitted,

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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 9, 2004]

No. 03-16171
Non-Argument Calendar

D.C. Docket No. 01-03047-CV-PT-E

BILLY RENEE BAILEY,
Plaintiff-Appellant,

versus

CLAY COUNTY ALABAMA, RALPH TOLAND,
Sheriff of Clay County individually and
in his official capacity, *et al.*,
Defendants-Appellees.

No. 04-10252
Non-Argument Calendar

D. C. Docket No. 01-03047-CV-PT-E

BILLY RENEE BAILEY,
Plaintiff-Appellant,

versus

FRANK THREAT, Jailor of Clay County, individually
and in his official capacity,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

(AUGUST 9, 2004)

BEFORE: CARNES, HULL and COX, *Circuit Judges*.

PER CURIAM:

Plaintiff Billy Renee Bailey appeals the judgment entered for the Defendants Ralph Toland (in his individual capacity), Frank Threats (in his individual capacity), and Clay County, Alabama, in Bailey's 42 U.S.C. § 1983 action alleging violations of her Fourteenth Amendment rights. We affirm.

Bailey makes two contentions on appeal: first, that the district court erred in entering summary judgment for Clay County and Sheriff Toland on Bailey's conditions-of-confinement claim, and second, that the district court erred by improperly instructing the jury on Bailey's rape claim against Jailer Threats. We take up these contentions in turn.

First, the district court entered summary judgment for Clay County and Sheriff Toland on Bailey's conditions-of-confinement claim pursuant to a thorough and well-reasoned opinion. After reviewing the record in light of Bailey's contentions, we conclude that the district court properly entered summary judgment. On appeal, Bailey points to no evidence showing that she sustained any injury from the overcrowding or food at the jail, or that either Clay County or Sheriff Toland knew of and was deliberately indifferent to a serious medical need of hers. Thus, we affirm the summary judgment which was based on qualified immunity as to Sheriff Toland and on the merits as to Clay County.

Second, Bailey contends that the district court erred by not instructing the jury that she was incapable of consenting to sexual intercourse with Jailer Threats because of the special relationship of authority that Threats had with her, an inmate. But Bailey neither submitted such an instruction, Fed. R. Civ. P. 51(a), nor distinctly objected to the court's failure to give such an instruction, *id.* at (d)(2). *See Heath v. Suzuki Motor*

Corp., 126 F.3d 1391, 1394 (11th Cir. 1997). Here, Bailey points to no legal authority in support of her position that all jailer-inmate sex is nonconsensual. And, the instruction that the district court gave comports with the law of all the other circuits which have considered whether consent is a defense to an inmate's charge that a jailer raped her. Thus, we conclude that the district court did not commit plain error in instructing the jury.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[Filed Sept. 16, 2003]

Civil Action No.: 01-PT-3047-E

BILLY RENEE BAILEY,

Plaintiff,

v.

CLAY COUNTY, ALABAMA; RALPH TOLAND, *et al.*,

Defendants.

FINAL JUDGMENT

In accordance with a memorandum opinion filed contemporaneously herewith, the motions for summary judgment filed by defendants Clay County, Alabama and Ralph Toland are granted in full. All claims against said Clay County, Alabama and Ralph Toland are dismissed, with prejudice. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment in favor of defendants Clay County, Alabama and Ralph Toland on all claims against them. Costs are assessed against the plaintiff.

This 15th day of September 2003.

/s/ Robert B. Propst
ROBERT B. PROPST
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[Filed Sept. 16, 2003]

Civil Action No.: 01-PT-3047-E

BILLY RENEE BAILEY,

Plaintiff,

v.

CLAY COUNTY, ALABAMA; RALPH TOLAND, *et al.*,

Defendants.

MEMORANDUM OPINION

This cause comes on to be heard upon supplemental submissions to Clay County, Alabama's ("Clay County") and Ralph Toland's ("Toland") (collectively "defendants") Motion for Summary Judgment (Doc. 85), filed on May 21, 2003.[1] In its July 25, 2003 Memorandum Opinion, this court ordered plaintiff Billy Renee Bailey ("Bailey") and defendant Toland to brief the issues of "overcrowding at the jail," "inedible food; lack of variety of food," and medical care. This court further ordered defendant Clay County to brief the overcrowding and food issues.

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[1] Sheriff Toland and Clay County both request awards of attorney's fees and costs in defending this matter "pursuant to 42 U.S.C. § 1488 and other law."

FACTS AND PROCEDURAL HISTORY[2]

Toland was at all relevant times the Sheriff of Clay County, Alabama. Plaintiff Billy Renee Bailey ("Bailey") was incarcerated at the Clay County Jail ("the Jail"). This lawsuit surrounds Bailey's incarceration in the Jail beginning on November 30, 1999. *See* Def. Ex. 15.

Bailey was released on January 18, 2000. Bailey alleges violations of 42 U.S.C. § 1983 as a result of unconstitutional conditions at the Jail and denial of medical care while incarcerated.

I. Overcrowding at the Jail

Bailey asserts that although the Jail was built to house 24 inmates, at the time of her incarceration the inmate population was averaging about 61 inmates per day. She also contends that the overcrowding problem was reported by local news sources. Defendants contend that Bailey herself admitted that often she only had one cellmate, and at times she had the entire cell to herself. *See* Def. Ex. 23 at 124, 131. At one point Bailey did have a cellmate that was present only on weekends. *Id.* at 131-32. At one point Bailey did mention sharing her cell with four or five other inmates, but that was apparently for one weekend only. *See* Def. Ex. 24 at 106, 206-07. With the exception of one evening in which Bailey was in a cell that had no bunk, she slept in her own bunk every night. *Id.* at 205-06. Bailey was given a mattress and sheets for her bed. *Id.* at 179. According to defendants, Bailey never attributed any injury to overcrowding during her deposition.

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[2] This memorandum opinion restates facts addressed is its July 25, 2003, memorandum opinion regarding overcrowding, food, and medical care at the jail, and adds new facts raised by the parties in their supplemental briefs.

In her supplemental brief, Bailey alleges that Toland knew of the overcrowding of the jail facility based on an August 1999 grand jury inspection in which Toland assisted. Also, Bailey notes, Toland admitted to discussing the overcrowding problems with the County Commission but did not put anything in writing because he wanted to work with the Commission on a "personal level." Toland apparently never applied to a judge to rectify the crowding problems. As to Clay County, Bailey argues, County Commissioner John Wheeles testified to awareness of the "crowded" condition of the jail in June 1999. According to Bailey, the County Commission also knew of the overcrowding problem from a grand jury inspection that informed the County the problem should be eliminated.

Significantly, Toland contends, the evidence demonstrates that there never were significant or sustained overcrowding problems in the female cells. Toland testified that from 1998 to 1999 the female inmate population declined over fifty percent[3] but the male inmate population in the male cells increased, particularly in the upstairs cells which housed only male inmates. Toland further testified that this increase could largely be explained by the presence of state prisoners which the Department of Corrections refused to accept.[4] Furthermore, Toland argues, he was doing all he could to encourage the Department of Corrections to take these excess inmates.

Similarly, Clay County alleges, County Commissioners like John Wheeles only knew about crowding problems in the upstairs, male-only section of the jail. *See* Ex. 34, p. 23. According to Clay County, in recognition of its duties to fund

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[3] According to Toland, during 1998, 101 female inmates were incarcerated in the Clay County Jail, and during 1999 (the period of Bailey's incarceration), 50 female inmates were incarcerated there.

[4] Health Department Inspector Rusty Miller testified to overpopulation in the upstairs portion of the jail but could not recall any problem with overcrowding in the female cell area. *See* Ex. 5, ¶15.

new jail facilities or renovate old ones, the County sought more funding for the jails through local acts in Montgomery. Clay County notes that the County Commission lacks taxing power. *See* Ex. 34. p. 70.[5] In the 2000 and 2001 Legislative Sessions, Clay County asserts, the Clay County legislative delegation (at the Commission's request) introduced local acts authorizing the County Commission to impose a cigarette tax, increase court costs, and raise the gasoline tax two cents per gallon in the County, in order to fund the purchase of the Russell Corporation Building and construction of a new jail. These local acts passed, and the County Commission then imposed the additional taxes and court costs. *See* Ex. 4, ¶ 7.[6] During the time that the County Commission was working with its legislative delegation to obtain financing for a new jail, funds for ongoing maintenance at the existing Clay County Jail were budgeted as in previous years with increases in each budget. *See* Ex. 34, pp. 109-10.

II. Food at the Jail

Bailey described the food at the Jail as "inedible," salty,[7] often containing foreign objects such as human and cat hair

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[5] In 1996 the Commission undertook to finance construction of a new jail, with funding sources to include additional court costs, a two cent gasoline tax, and a tobacco tax. *Id.* In Fall 1996, the Commission appointed a Blue-Ribbon Committee comprised of Clay County business leaders to consider how to obtain funds to build a new jail. *See* Ex. 4, ¶ 6. An occupational tax proposal on the 1998 ballot failed by a large margin. *Id.*

[6] In October 2000, the County Commission gave the Chairman and County Administrator authority to negotiate the purchase of the vacant Russell Corporation Building in Ashland, in order that the building could be converted into a new county jail as well as offices for the Sheriff, the adult probation officers, and the County Commission. An agreement was reached in 2001 and the jail portion of the building was scheduled for completion at the end of July 2003. *See* Ex. 4, ¶ 8. This court does not know the current status of the jail construction.

[7] Bailey stated that the saltiness of the food was a health risk since she had been prescribed a low-sodium diet by a physician.

and other dried food, and lacking variety ("You were served the same thing every day"). *See* Def. Ex. 24 at 114-16.[8] Bailey did not like what the Jail was serving and quit eating at one point until a kitchen employee began to make her grilled cheese sandwiches. *Id.* at 118. She eventually tired of that meal as well. *Id.* at 119. Bailey contends that another inmate suffered food poisoning, but neither Toland nor Jail Administrator Studdard has ever been made aware of food contamination incidents. *See* Def. Ex. 1 at ¶ 13; Ex. 3 at at ¶ 2.[9] Health Inspector Rusty Miller also stated that he had not been made aware of complaints of contaminated food being served or of food poisoning. *See* Def. Ex. 5 at ¶ 14.

The Jail's policy was to serve inmates three well-balanced meals each day. The Jail Administrator placed store orders (including orders for bread, meats, poultry, fish, canned/dried items, and other general foods/supplies) based upon detailed lists and accounting of the needed items and the number of those items remaining in storage. Kitchen trusties prepared the food and were required to wear hairnets and gloves. Trays and utensils were gathered after each meal, when trays were cleaned and rinsed before being placed in a high-steam sanitizer. *See* Def. Ex. 3 at ¶¶ 13-14. Cups issued to inmates upon their incarceration could be kept by inmates for use throughout the day.[10] The Jail gave inmates soap and detergent to keep their cups clean. *Id.* at ¶ 15. All meal-time drinks were poured from a common tea or water pitcher into each inmate's cup.

When Rusty Miller inspected the kitchen in December 1999, it received a rating of 89, which defendants assert is

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[8] Specifically. Bailey stated, she tired of peanut butter and baloney sandwiches.

[9] Tolend testified that he had not heard complaints about the food in several years. *See* Ex. 1, ¶ 13; Ex. 3, ¶ 12.

[10] Inmates could keep cups from home if they wished.

acceptable. According to defendants, the few deductions that were taken had nothing to do with the Jail's food protection measures. *See* Def. Motion at 25. Defendants also note that the score of 89 showed improvement from the two previous inspections, where the kitchen received scores of 87 and 88 on June 2, 1999 and September 29, 1999, respectively. *See* Def. Ex. 5 at ¶ 13; Exs. 12-14.

During his December 1999 inspection, Miller noted no deficiencies in the following areas: food, food protection, personnel (hygiene), water, sewage, garbage/refuse disposal, pest control, kitchen ventilation, dressing rooms, and miscellaneous areas. Miller found that all food protection measures such as temperature control, thawing, and storage met the requisite standards. Further, the hygiene of the food handlers and preparers, food disposal, and water sources met the requisite standards. The deficiencies noted in Miller's December 1999 inspection involved the tabletop surface upon which foods were prepared, some plumbing maintenance, broken areas of the floor and wall, and the shielding of light fixtures.[11] The largest number of points deleted (4) was based on having no separate locked bathroom facility for each "trusty" cell.[12]

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[11] Consistent with Bailey's allegations. Clay County health reports did mention roaches and the refrigerator temperature at the Jail. The June, September, and December 1999 health reports all mention eliminating roaches. However, although the June 1999 health report noted the need to repair or replace the refrigerator since it did not operate at the proper temperature, both the September and December 1999 health reports stated: "two refrigerator/freezers have been replaced." *See* Def. Ex. 12-14.

[12] Health Inspector Miller testified that the bathroom facility is located a few feet down the hallway from the trusty dorm and within ten yards of the kitchen. According to Miller, the inspection report noted this deficiency because the bathroom facility is not more conveniently accessible within the trusty dorm area itself, and the deduction was made because trusties work in the kitchen. *See* Ex. 5, ¶ 12.

III. Medical Care at the Jail

A. The Jail's Medical Care/Medication Policies and Procedures

The Jail's policy is to provide medical attention upon any inmate's written or verbal request. In an emergency situation, the inmate will be transported to the emergency room or the Clay County rescue squad will be called. For non-emergency situations, the inmates are generally scheduled for the first available appointment at the Clay County Medical Clinic. *See* Def. Ex. 1 at ¶ 5; Ex. 3 at ¶¶ 5-6. It was also the policy of the Jail to provide inmates with any and all medications brought with them to the Jail or prescribed to them during their incarceration. *Id.* Defendants assert that Bailey was familiar with the procedures, as she filled out a medical request form for her cellmate, Kerrie Baker. *See* Def. Ex. 23 at 49. Both Toland and Studdard stated that, to the best of their knowledge, Bailey received care and/or medication every time that she requested it. *See* Def. Ex. 1 at ¶ 5; Ex. 3 at ¶ 5.

B. Medical Care Received by Bailey While Incarcerated

Bailey was booked into the Jail on November 30, 1999 at 8:30 p.m. by Jailer Joshua Gregg ("Gregg"). *See* Def. Ex. 16. Bailey signed the booking sheet[13] which indicated that she had given all information "concerning [her] health during this medical screening." *Id.* Bailey indicated that she suffered from (1) mental illness, for which she took Xanax and Paxil, (2) hypertension, (3) back trouble, and (4) a venereal disease (genital herpes). *See* Def. Ex. 17. On December 1, 1999, Jail staff contacted Bailey's treating physician upon her claim that she was suffering a panic attack. The medical records reflect that an "okay [was] given to Clay County jailer for pt [patient] to have additional 1 mg Xanax in event of panic attack per

[13] A twenty-five question checklist concerning various health issues accompanied this medical statement. A "yes" was marked for history of suicidal tendencies and strange behavior at time of incarceration. Def. Ex. 17.

Dr. Chafe."[14] *See* Def. Ex. 18; Ex. 19. Bailey asserts that she suffered her first panic attack at the Jail, *see* Def. Ex. 24 at 70; however, defendants contend that Bailey had a past medical history of panic attacks. *See* Def. Ex. 21(a) at page 3 (listing "panic attack" under pastmed/surg column).

Five days later on December 6, 1999, Bailey asked Gregg to arrange for her to see Investigator Jean Dot Alexander because she could "smell . . . semen" when she urinated. *See* Def. Ex. 23 at 148-49. Investigator Alexander came to the Jail to meet with Bailey, who stated that someone had sex with her. *Id* at 149.[15] Alexander began an investigation into the complaint and transported Bailey to the Clay County Hospital. *See* Am. Compl. at ¶ 11; Def. Ex. 23 at 150.[16] The doctors detected semen, bruising on Bailey's shoulder, thigh, and breasts, and teeth marks on her breasts. *See* Def. Ex. 23 at 150-52.

Bailey contends that she could not remember anything about the incident until the next day, and she believes that she was drugged because she had no memory and slurred speech. *See* Def. Ex. 23 at 149-50; 158-59. However, the doctor's notes from Bailey's trip to the emergency room stated: "NAD [no apparent distress], alert, speech is clear." *See* Def. Ex.

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[14] In her supplemental brief, Bailey notes that on various occasions her requests for medication were denied. On one particular occasion, Bailey alleges, she asked her jailer, defendant Frank Threat, to bring her Aleve for fever, but he raged and reached for his mace. There is no evidence that Toland was aware of the incident.

[15] Bailey alleges that she was raped by defendant Frank Threat. This court has previously dismissed all claims against Toland and Clay County concerning the alleged rape.

[16] Toland denies any delay in transporting Bailey to a physician after she transported her alleged rape on December 6, 1999. Citing excerpts from Bailey's first deposition, Toland contends that Alexander's "investigation" consisted of asking the question "what happened," to which Bailey responded "someone had sex with me." Immediately afterward, Toland contends, Bailey was transported to the hospital.

21(a). According to Toland, all of these records are devoid of any mention of Bailey being drugged. No drug screening was ordered, and Bailey herself admitted that no one has actually ever told her that she was drugged. *See* Def. Ex. 23 at 158.[17]

The Clay County Hospital performed a number of tests on Bailey, including a urine HCG pregnancy test, which was positive, and a rape kit. *See* Def. Ex. 21(a). Because the urine HCG test was positive, a serum, or blood HCG test (beta HCG) was also performed. The result of the latter test was 1, and defendants contend that any number less than 5 is considered a negative test for pregnancy. *See* Def. Ex. 27 (expert report); Def. Motion at 31. As Bailey had already left the hospital when these results came back, a nurse called the Jail and informed Jailer Leroy Brown that the test was negative, specifics about Bailey's medication, and that Bailey should see her "OB doctor ASAP." *See* Def. Ex. 21(a).

Later that same night, at 10:15 p.m., Bailey was readmitted to the hospital to "R/O [rule out] ectopic pregnancy." *See* Ex. 21(b). Bailey had an ectopic pregnancy before, prior to her tubal litigation, and she was concerned that she may have another one because of the alleged rape. *See* Def. Ex. 21(a). An ultrasound was performed which found no "evidence of intrauterine pregnancy identified," although it did not rule out such a possibility because it may have been too early to tell. *See* Def. Ex. 21(b). Bailey was taken back to the hospital on December 8 and 10 for follow-up HCG tests, but it was determined on December 10, 1999 that no further treatment was needed. *Id.*, Def. Motion at 32-33.[18] The December 10th

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[17] Defendants note that three and one-half months earlier, Bailey apparently thought that she had been drugged by her estranged husband while they were at dinner together. *See* Def. Motion at 30 n.10.

[18] Apparently, on December 7, 1999, Bailey's general physician asked that she be transported to Dadeville for an examination. While the jail staff was prepared to facilitate this request, Toland contends, Bailey refused to go. *See* Def. Ex. 22.

test confirmed she was not pregnant. Defendants assert that the evidence shows that Bailey, even if she was pregnant, could not have become so as a result of the alleged rape. *See* Def. Motion at 32.

Bailey states that she miscarried "six days" after the alleged assault. *See* Def. Ex. 24 at 47-48: She further alleges that Jailers Jason Gentry and Leroy Brown refused her request to be taken to the doctor after she noticed spotting; instead, Gentry "ignored" her and Brown "snickered at [her] when he walked past and he wouldn't stop." *Id.* Defendants counter that Brown was not on duty on December 11 or December 12, 1999. Defendants also again contend that the weight of evidence suggests that Bailey was not ever pregnant, and thus could not have miscarried. *See* Def. Motion at 34-35; Def. Ex. 27.[19] Furthermore, Defendants contend, Bailey cannot show that the problems she suffered after leaving the Jail are attributable to events that occurred at the Jail. *See* Def. Br. at 36-37 (discussing cause of Bailey's subsequent surgery. etc.).

Bailey also contends that she began suffering from the flu and requested medical attention. *See* Def. Ex. 23 at 52-53. However, Bailey contends, it was three or four days before someone took her to the doctor, even though she had been

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[19] Toland relies upon medical testimony provided by Dr. Lee Sharma, a board-certified gynecologist practicing in Alabama. After examining Bailey's medical records, Dr. Sharma concluded that Bailey most likely was never pregnant, never suffered a miscarriage, and experienced any subsequent problems because of a pre-existing disease rather than anything that happened at the Clay County Jail. *See* Def. Ex. 27, p. 1 of Affidavit, pp. 5-6 of Report.

Bailey previously attacked Dr. Sharma's opinion, noting that she had not deposed Dr. Sharma, Dr. Sharma never personally examined her, and the doctor had only been practicing medicine for six years, etc. Bailey also noted that Sharma's medical opinions, even if accepted, have no bearing on her jail conditions claims. *See* Pl. Toland Reply Br. at 3-4.

asking for medical care the entire time. *Id.* On December 29, 1999, Bailey was taken to the Clay County Medical Clinic. Bailey was prescribed cough medicine, an antibiotic, and anti-nausea medication. *See* Def. Ex. 25. According to jail logs, Bailey took the entire course of cough and antibiotic medicines but refused to take the anti-nausea medication. *See* Def. Ex. 19. According to Toland, on December 29, 1999, Bailey complained of flu and was examined by Dr. Hensleigh of the Clay County Medical Clinic. No evidence indicates Bailey complained to Hensleigh of having flu symptoms for several days or suspecting a miscarriage.

Finally, on January 4, 2000, Bailey was taken to the emergency room with a complaint of right knee pain.[20] Medical records show that Bailey refused aspiration of her knee, which was swollen with "joint fluid." *See* Def. Ex. 21(e). She was given prescription strength Motrin and released back to the jail with a final diagnosis of arthritis. *Id.* Toland contends that Bailey made no other medical requests or complaints until the time of her release on January 18, 2000. *See* Ex. 5.

Bailey contends that all these requests were only made to jailers because defendant Toland refused to see her after she made several requests for a conference with him. Bailey testified, "[W]hen you asked to be taken to the doctor . . . they wouldn't take you or they would ignore me. When you asked why was your medication late, they would ignore you." Bailey admitted she never talked to Toland personally. Toland testified that he never received any verbal or written complaint from Bailey concerning any condition within the jail that was causing her to suffer, including any alleged denial of medical treatment. Toland did learn about the alleged rape soon after it supposedly occurred.

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[20] On this occasion, Bailey alleges, she was denied medical treatment for her knee injury for three to four days.

IV. Procedural Posture

Bailey filed her original complaint on November 29, 2001, against Clay County, Toland and defendant Frank Threat. On March 5, 2002, the court dismissed all state and federal claims against Clay County and Toland in his official capacity. All state claims were dismissed against Toland in his individual capacity. *See* Docs. 24-25. Bailey filed an amended complaint against Toland and Threat on March 19, 2002. On June 24, 2002, the court again dismissed any claims against Toland in his official capacity. As to his individual capacity, the court allowed Bailey to maintain federal claims for unconstitutional jail conditions (which presumably would include denial of medical care), but not for claims related to the alleged rape. *See* Docs. 39-40. The rape claims were allowed against Threat, but the court noted that any trial would be bifurcated so that no evidence of the rape could be introduced against Toland. *Id.* Additionally, the court allowed Bailey to maintain federal claims for alleged unconstitutional jail conditions against Clay County.

On July 25, 2003, the court issued a memorandum opinion striking most of the violations alleged by Bailey, except for overcrowding, food, and medical care. As to Toland, the court ordered defendant to brief all three alleged violations. As to Clay County, the court ordered briefing on overcrowding and food (as the only possible bases for Clay County's liability).

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted based upon facts developed through pleadings, discovery and supplemental affidavits, etc., if together, they show that there is no genuine issue as to any material fact. *Celotex Corp. v. Garrett*, 477 U.S. 317, 322-323 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judg-

ment bears the initial burden of explaining the basis of his motion. *Celotex*, 477 U.S. at 323. "It is never enough [for the movant] simply to state that the non-moving party could not meet their burden at trial." *Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000) (quotation omitted). The non-moving party then bears the burden of pointing to specific facts demonstrating that there is a genuine issue of fact for trial. *Celotex*, 477 U.S. at 324. The non-moving party "must either point to evidence in the record or present additional evidence 'sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.'" *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quotation omitted). Summary judgment is required where the non-moving party merely repeats its conclusory allegations, unsupported by evidence showing an issue for trial. *Comer v. City of Palm Bay*, 265 F.3d 1186, 1192 (11th Cir. 2001) (citation omitted).

Summary judgment will not be granted until a reasonable time has been allowed for discovery. *Comer*, 265 F.3d at 1192. Moreover, "[w]hen deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the non-moving party." *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999). Finally, the trial court must resolve all reasonable doubts in favor of the non-moving party, although it need not resolve all doubts in a similar fashion. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990).

ARGUMENTS

I. General Legal Observations

Bailey observes that the public is responsible for prisoner care because prisoners cannot care for themselves. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation omitted). Regarding county jails, the county's duty is limited to providing facilities and funding the operation of the jail. *See Turquitt v*

Jefferson County Alabama, 137 F.3d 1285, 1289 (11th Cir. 1998) (citation omitted).[21] Bailey argues, "A local government can be directly responsible for a constitutional violation due to its acts or omissions" *Marsh v. Butler County, Alabama*, 268 F.3d 1014, 1026 (11th Cir. 2001). Furthermore, Bailey contends, a sheriff's legal duties are founded upon "the legal custody and charge of the jail in his county and all prisoners committed thereto, except in cases otherwise provided by law, and may appoint a jailer for whose acts he is civilly responsible." *See Ala. Code* ¶ 14-6-1 (1975). As such, Bailey argues, Sheriff Toland "is responsible for the more specific jail conditions that the Court has found attributable to him."[22]

The Alabama Code, Bailey concludes, intended that county commissioners and sheriffs be responsible for their actions. According to Bailey, neither defendant followed Alabama statutory law, and each defendant is liable. Bailey observes that "the conditions for which the Defendants are responsible are intertwined. For example, the overcrowded condition has likely contributed to the inattention to the medical and nutritional needs of the inmates—there were simply too many prisoners for the limited staff that was provided."

Defendant Clay County observes that the Constitution only requires jail authorities to provide the "minimal civilized measure of life's necessities . . . . [not] comfortable prisons." *See Rhodes v. Chapman*, 452 U.S. 337, 347-49 (1981). Fur-

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[21] Plaintiff relies upon *Hamm v. Dekalb County*, 774 F.3d 1567, 1573 (11th Cir. 1985) for the following: "[I]t has also been held that governments can always improve the food, living conditions, and medical treatment at these detention facilities by increasing the funds for those facilities." As noted in this court's July 25, 2003 Memorandum Opinion, *Hamm* also stated: "Thus, a state's decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provisions of those necessities serves a legitimate purpose: to reasonably limit the cost of detention." *Id.*

[22] The court does not recall any such specific "findings."

ther, Clay County contends, deprivations must be "sufficiently grave" to rise to the level of Eighth (or Fourteenth) Amendment violations. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991). According to Clay County, Bailey has not shown that she was denied the minimal necessities of civilized life or that she experienced anything more than discomfort (if that) due to the Jail's alleged overcrowding and inadequate food service. Moreover, Clay County contends, Bailey has demonstrated no deliberate indifference on the part of Clay County. Finally, Clay County argues, even if it is true that governments can improve food and living condition in jails by increasing funds for them, "it does not follow that the failure to perpetually increase funding equates to a constitutional violation." *See* Def. Supp. Brief at p. 2, relying upon *Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985).

II. Overcrowding at the Jail

A. Bailey's Position

1. Liability of Clay County

First, Bailey reminds this court of its observation that Clay County can be held liable for jail overcrowding.[23] Bailey relies upon Alabama Code §§ 14-6-103 and 11-14-13 regarding county jails:

> Each county jail or town or city prison must be of sufficient size and strength to contain and keep securely the prisoners confined therein and must contain separate apartments for men and women . . . .
>
> The county jail must be of sufficient size and strength to keep securely the prisoners which may be confined therein and must contain at least two apartments, properly

[23] The July 25, 2003 memorandum opinion stated: "The only reasonably (perhaps) arguable basis for liability of the county are as stated in numbers 3 (food) and 9 (overcrowding)."

> ventilated so as to secure the health of those confined therein: one for men and one for women.

Housing excessive numbers of inmates, *see Nicholson* at 308, or having prison conditions that result 'unquestioned and serious deprivation of basic human needs,'" *see Johnson v. U.S.*, 816 F.Supp, 1519, 1523 (N.D. Ala. 1993) (citation omitted), constitutes cruel and unusual punishment.

Bailey notes that jail health reports had admonished Clay County to eliminate overcrowded conditions and raised the issue of "[b]eds too close together." Moreover, Bailey argues, Clay County should have been aware of the alleged unconstitutional jail conditions due to the various established reporting methods. The Department of Corrections must inspect the jails to secure justice, humanity, and economic management. *See Turquitt* at 1289. Likewise, the County was required to stay informed about conditions within the jail, as reflected in the statutory mandate regarding county health officers. *Id.* at 1290.[24] Pursuant to its right, Bailey notes, Clay County inspected the county jail. Alabama law also imposes a duty on the County Commission to appropriate money for the county jail and to order the issuance of a warrant payable to the sheriff regarding this appropriation. *See* Ala. Code ¶ 11-14-20.

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[24] Pursuant to Ala Code ¶ 22-3-5(3)(1975), county health officers must:

> [V]isit all jails . . . and . . . make careful investigation as respects the drinking water, food, clothing, and bedding supplied to prisoners and as to the ventilation, air space, heating and bathing facilities, drainage, etc., of these institutions; and when any of said supplies are found to be inadequate in quantity or deficient in quality or any said conditions unsanitary, the county health officer shall make in writing a report thereof to the . . . county commission or the proper municipal authorities, as the case may be. [These same parties] shall carry out whatever recommendations are made by the county health officer. . . .

Specifically, Bailey points to Commissioner Wheeles's awareness of the "crowded" conditions at the Clay County jail, as well as Clay County's awareness stemming from a 1999 grand jury inspection and previous discussions among Commission members.

2. Liability of Toland

Bailey cites from the Alabama Code:

> If the jail of any county is destroyed, or becomes insufficient or unsafe, or any epidemic dangerous to life is prevalent in the vicinity or there be danger of rescue or lawless violence to any prisoner, any circuit court judge may, on the application of the sheriff and proof of fact, direct the removal of any prisoner or prisoners to the nearest sufficient jail in any other county; and it is the duty of such judge, in such case, to make an endorsement on the order or process of commitment, stating the reason why such removal is ordered, and to date and sign such endorsement.

Ala. Code § 14-6-7(1975). Although Sheriff Toland knew of the overcrowding problem at the jail, Bailey asserts, he did not attempt to put the issues in writing because he wanted to work with the Commission on a "personal level." No evidence suggests that Toland petitioned a judge to rectify this condition.

B. Toland's Position

Sheriff Toland emphasizes Bailey's failure to connect overcrowding in the male inmates' section of the jail with her own constitutional rights. Even if Bailey proved part of the jail was exceeding its design capacity, Defendants argue, that fact does not mean Bailey herself suffered a constitutional deprivation. Plaintiffs do not have standing to assert other inmates' claims, Toland contends. *See, e.g., Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998); *Weaver v. Wilcox*, 650 F.2d

22.27 (3d Cir. 1981); *Johnson v. Jones*, 2001 WL 102343, *5 n.3 (S.D. Ala. 2001).

Toland highlights Bailey's testimony about having only one cellmate, sometimes the cell to herself, multiple cellmates for just one weekend, and her own bunk except for one night when she was in the administrative segregation cell.[25] Furthermore, Toland notes, in her deposition Bailey does not attribute any injury to the alleged overcrowding.

While the record reveals male overcrowding in the Jail, Toland asserts, there is no evidence of female overcrowding.[26] Additionally, Toland argues, even if Bailey had suffered some constitutional deprivation due to overcrowding, Toland could only be held liable if he knew about her situation and was deliberately indifferent to it. Here, Toland contends, Bailey has presented no evidence of Toland's knowledge or deliberate indifference.

C. Clay County's Position

Clay County adopts and incorporates arguments contained in Toland's suppplemental brief. Most importantly, Clay County contends, Bailey has shown no link between her own constitutional rights and overcrowding in the male section of the jail. Moreover, Clay County argues, Bailey has offered no evidence that Clay County knew of specific injuries to Bailey and was deliberately indifferent to them. Clay County asserts that Bailey's reliance on certain Alabama statutes is misplaced, since "such objective knowledge is insufficient to establish notice after the United States Supreme Court's ruling in *Farmer v. Brennan*, 511 U.S. 825 (1994)." While pre-Farmer cases suggested that objective awareness would suf-

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[25] Toland draws the court's attention to the holding in *Castillo v. Bowles*, 687 F. Supp. 277, 281 (N.D. Tex. 1988) ("[T]he fact that Plaintiff was temporarily forced to sleep on the jail floor does not give rise to a violation of his constitutional rights and is not cognizable under § 1983.")

[26] These facts are addressed earlier in this memorandum opinion.

fice to establish deliberate indifference to plaintiff's needs, Clay County contends, Farmer rejected that understanding and required a subjective component. *See Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996). According to Clay County, County Commissioners like Commissioner Wheeles were only aware of overcrowding in the male section of the Clay County Jail.[27]

Moreover, Clay County argues, the Commission's concrete actions in responding to the problem—seeking to enhance revenue through local acts, appointing a Blue Ribbon Committee of business leaders to study the problem, authorizing the purchase of the Russell Corporation Building as a new county jail—demonstrate "anything but" deliberate indifference. In light of this evidence, Clay County contends, Bailey has created no genuine issues of fact as to whether she suffered injuries stemming from overcrowding in other parts of the jail, whether Clay County knew of any such injuries. and whether Clay County was deliberately indifferent to her situation.

III. Food at the Jail

A. Bailey's Position

Bailey recounts specific problems she encountered with jail food and specific problems with the condition of the kitchen, as revealed by health reports.[28] On the issue of Clay County's

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[27] Clay County observes that constitutional violation does not necessarily follow from excess capacity; instead, courts consider whether the overcrowding led to deprivation of food, medical care, or sanitation. *See Rhodes v. Chapman*, 452 U.S. 337, 345 (1982) (finding no Eighth Amendment violation in a situation where "double celling made necessary by the unanticipated increase in prison population . . . neither . . . [led] to deprivations of food, medical care, or sanitation . . . [n]or . . . increase[d] violence among inmates or create other conditions intolerable for prison confinement."

[28] These facts are addressed earlier in this Memorandum Opinion.

liability, Bailey argues, Alabama law mandates: "[t]he county commission of each county shall supervise the feeding of all prisoners in the county jails over which it has jurisdiction." Ala. Code § 14-6-41(6)(1975). Furthermore, Bailey argues, "[t]he failure to properly prepare and serve nutritionally adequate food to inmates who are unable, due to their confinement, to seek alternative sources of nutrition constitutes a violation of the inmates' Eight and Fourteenth Amendment rights." *See Nicholson v. Choctaw County Alabama*, 498 F. Supp. 295, 309 (S.D. Ala. 1980).

Regarding Toland's liability, Bailey contends, the foundation of a sheriff's duties is the legal custody and charge of his jail and its prisoners. *See* Ala. Code § 14-6-1 (1975). Moreover, Bailey contends, Sheriff Toland is charged with feeding (whether in person or through a jailer) prisoners in the jail under his jurisdiction, *see* Ala. Code ¶ 14-6-40 (1975), and "shall see that the food for the inmates of the jail . . . is nutritious, clean, wholesome and of sufficient quantity and variety and shall have kitchens where food is prepared for the inmates adequately screened against flies." *Ala. Code* § 14-6-97 (1975). The lack of variety of food at the Jail, Bailey argues, violated this statute.

B. Toland's Position

Despite Bailey's allegation that another inmate suffered from food poisoning, Toland asserts, neither Toland, the jail administrator, nor Health Inspector Miller were aware of any such incident. Toland testified that he had heard no complaints about food for several years. *See* Ex. 1, ¶ 13; Ex. 3, ¶ 12. Toland cites facts mentioned earlier in this memorandum opinion regarding food service and preparation in the jail and health/sanitation measures. Toland realleges that the December 22, 1999 kitchen inspection score of 89 demonstrated improvement over the prior two inspections. Toland contends that Bailey's food-related complaints do not rise to the level of a constitutional claim or prove deliberate indiffer-

ence. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (1985) ("The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation.") Furthermore, Toland contains, there is no proof that Toland personally knew of Bailey's food-related complaints and Bailey has not identified clearly established law which would have put Toland on notice that his conduct (regarding Bailey's food complaints) was unconstitutional.

C. Clay County's Position

Clay County adopts and incorporates Toland's supplemental arguments, including Toland's reliance on the *Hamm* case and Toland's detailed account of the Jail's enforced policies to ensure adequate food service and health measures. Additionally, Clay County argues, Bailey never demonstrated that Commissioner Wheeles was aware of alleged food problems in the jail, so plaintiff has not made a case for deliberate indifference.

IV. Medical Care at the Jail

A. Bailey's Position

Bailey cites Alabama Code § 14-6-9:

> When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail and that fact is made to appear clearly to any circuit court judge, such judge must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place or hospital, as near as may be to the jail, and there safely to keep him until his health is sufficiently restored to authorize his recommitment to jail.

This statutory provision also requires the sheriff or jailer to provide "necessary medicines and medical attention to those who are sick or injured, when they are unable to provide for themselves." *Id.*

Bailey contends that Toland violated both her Eighth and her Fourteenth Amendment rights. Bailey notes that these two amendments place limitations on the "treatment and conditions that states impose on prisoners." *See Hamm* at 1571. Importantly, Bailey asserts, the minimum standards for providing medical care and basic necessities to pre-trial detainees and convicted prisoners are the same. *See Lancaster v. Monroe County, Alabama*, 116 F.3d 1419, 1425 (11th Cir. 1997); *Hamm* at 1574. However, Bailey contends, pre-trial detainees have some rights that inmates do not have: "While a sentenced inmate may be punished in any fashion not cruel and unusual, the due process clause forbids punishment of a person awaiting trial but not yet adjudged guilty of any crime." *Hamm* at 1572. If a condition is not reasonably related to a legitimate goal, *i.e.*, is arbitrary or purposeless, a court may infer that the purpose of the governmental action is "punishment" that may not be inflicted upon detainees. *Id.* at 1573. Furthermore, Bailey argues, "it is an unreasonable response for an official to do nothing when confronted with prison conditions . . . that pose a risk of serious physical harm to inmates." *Marsh* at 1034. Bailey notes generally that Alabama law gives the sheriff control over inmates, jail employees, and the jail. *See Ala. Code* § 14-6-1 (1975).

Despite Toland's deposition testimony to the contrary,[29] Bailey argues, Toland knew or should have known of Bailey's medical needs, since Toland required her to provide information about her medical history and current medications during

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[29] Toland's deposition stated:

> Q: What about, do you know whether or not Ms. Bailey asked for medical attention during the course of the time she was there; and during the course of time she said she had a miscarriage, whether she asked for medical care that she didn't get?
>
> A: I don't have any—any knowledge of that.

See Pl. Supp. Brief. Attach. B.

the initial booking process. The initial booking sheet included her medical conditions, *e.g.* "back problems," "hypertension," and "mental illness," her medications, e.g., Xanax and Paxil, and a twenty-five question checklist that revealed Bailey's history of mental illness, suicidal tendencies, and strange behavior at incarceration. Toland's extensive submission of Bailey's medication logs, Bailey contends, actually supports the inference that Toland had full knowledge of Bailey's sub-standard medical conditions.

Bailey argues that the most important medical condition she suffered in jail and the condition "that could possibly be the most severe with respect to long-term physical, psychological and emotional trauma producing irreparable harm" was her alleged rape. Her alleged rape, Bailey contends "presented the Defendant with a situation of the utmost importance and one where time was of the essence to see that [I] received the appropriate medical attention." By subjecting her to interrogation instead of immediately addressing her physical needs, Bailey argues, Toland delayed the urgent need for treatment. According to Bailey, this untimely delay exacerbated the medical conditions she suffered upon admittance to the Clay County Jail and resulted in the development of additional medical conditions after her release.[30]

Bailey admits that she must allege at a minimum that Toland acted with "deliberate indifference" to her medical conditions. *See Wilson v. Setter*, 111 S. Ct. 2321 (1991).[31] When considering a "deliberate indifference" claim, Bailey contends, courts should consider whether the official knew of

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[30] The court adheres to its previous position that it will not admit any evidence related to the alleged rape against Toland or the County. The medical attention in that regard was certainly not indifferent. Persistence in pursuing this claim against Toland does not add to its validity.

[31] *Wilson* further held that "only those deprivations denying 'the minimum civilized measure of life's necessities,' are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* at 298 (citation omitted).

the plaintiff's need for medical care.[32] Additionally, Bailey argues, plaintiff's showing that a doctor took the "easier and less efficacious route in treating an inmate" or that medical care was delayed or denied would be sufficient to prove deliberate indifference to the inmate's health and safety. *See McDuffie v. Hopper*, 982 F. Supp. 817, 826 (M.D. Ala 1997) (citation omitted). Furthermore, Bailey argues, "grossly incompetent, inadequate, or excessive [medical care] as to shock the conscience or to be intolerable to fundamental fairness," has been held to violate the Eighth Amendment. *See Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986).

Bailey adds that "failure to provide prompt attention to serious medical treatment for non-medical reasons" constitutes deliberate indifference. *Lancaster* at 1425.[33] Bailey

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[32] Bailey quotes from Justice White's concurrence in *Wilson*: "[a]n express intent to inflict unnecessary pain is not required." (citation omitted). Justice White concurred in the judgment, not the opinion.

[33] On the issue of delay, Bailey relies upon *Hill v Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994, which indicated that delay in medical treatment is a primary factor in considering the seriousness of an inmate's medical reeds. This court notes that *Hill* also stated:

> Where the delay results in an inmate's suffering "a life-long handicap or permanent loss, the medical need is considered serious." An inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed. Further, we have held that "[t]he tolerable length of delay in providing medical attention depends on the *nature* of the medical need and the *reason* for the delay (Emphasis added). Consequently, delay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for the delay.

(Citations omitted). *Id.* at 1188.

Furthermore, this court notes, *Hill* defined a serious medical need as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the

repeats her factual contentions that medication and treatment were delayed at various times during her incarceration.[34]

B. Toland's Position

Bailey's complaint, Toland states, alleged Toland's failure "to provide adequate medical care to the Plaintiff when she miscarried a few days [after becoming pregnant], resulting in serious consequences to her health [and] [s]everal months later, she underwent surgery as a result of health problems created thereby." Toland argues that he is entitled to summary judgment for the following three reasons:[35] (1) Bailey offered no competent medical evidence that she was pregnant, miscarried, or suffered "any serious consequences to her health" as a result of her incarceration at Clay County Jail; (2) Bailey offered no evidence or legal authority to justify a finding that Toland was "deliberately indifferent" to a serious medical need (even if Bailey could prove she had one); and (3) Bailey offered no "clearly established law" sufficient to deprive Sheriff Toland of qualified immunity.

Addressing the first reason, Toland argues that Bailey has not "set forth evidence of an objectively serious medical need." *See Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). On the other hand, Toland argues, defendants have offered competent medical testimony by a board-certified gynecologist (Dr. Sharma) that Bailey was most likely never

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necessity for a doctor's attention." *Id.* at 1187 (quoting *Laaman v. Heigemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977)).

[34] Bailey alleges that Jailer Threat refused to provide Aleve for her fever when she asked, Jailer Gentry refused to take her to the doctor when she miscarried, jailers waited three to four days before taking her to the doctor for the flu, and jailers waited three to four days before taking her to the doctor for her injured knee. According to plaintiff, she only went to jailers with these requests because Toland refused to see her.

[35] The first two reasons, Toland argues, are relevant to his qualified immunity claim.

pregnant, never miscarried, and experienced any subsequent problems due to a pre-existing disease rather than what happened at Clay County Sail. According to Toland, Bailey has not refuted Dr. Sharma's opinions.

Addressing the second reason, Toland recounts facts concerning medical attention Bailey received in jail.[36] Toland emphasizes that Sheriff Toland, sued in his individual capacity, can be held liable: only for actions he took or policies he instituted. *See Hardin v. Hayes*, 957 F.2d 845, 849 (11th Cir. 1992) ("Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability.") Rather, Toland argues, policymakers and supervisors are liable only when "there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *See Belcher v. City of Foley*, 30 F.3d 1390, 1396-97 (11th Cir. 1994) (citation omitted). Indisputably, Toland asserts, Toland had no interaction or personal involvement with Bailey,[37] and Bailey has not challenged Toland's policies. Furthermore, Toland argues, Bailey's contention that Toland can be personally liable for facts he did not know but "should have known" contradicts the U.S. Supreme Court's *Farmer* standard (requiring subjective knowledge on the part of the official).[38]

Even if Toland could be held liable on the medical care issue, Toland contends, Bailey received care far exceeding constitutional requirements. In support of this contention, Toland repeats facts about Bailey's in-take assessment and

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[36] These facts are addressed earlier in this Memorandum Opinion.

[37] These facts are addressed earlier in this Memorandum Opinion.

[38] Toland testified as follows: Plaintiff's Complaint was his first indication of Bailey's problems with jail conditions, Bailey neither wrote nor spoke to him about jail conditions or denial of medical treatment while she was in jail, and if any of the inmates had concerns about basic sanitation or comfort, they weren't telling him about it.

prescribed medication.[39] After Bailey's alleged rape, Toland notes, no evidence indicates a delay in getting her to a physician. Rather, Bailey has testified that Inspector Jean Dot Alexander took her to the hospital right after their meeting concerning the alleged rape. Toland also provides evidence about Bailey's multiple hospital and physician visits after the alleged December 6, 1999 rape.[40] Incidentally, Toland contends, while Bailey's supplemental brief briefly touched upon "back problems," "hypertension," "mental illness," and "suicidal tendencies," she has not developed arguments about these conditions.[41]

Finally, on the qualified immunity issue, Sheriff Toland adopts and incorporates the citations contained in his previous summary judgment submissions and argues that Bailey has not cited legal authority to justify denying him qualified immunity.[42]

CONCLUSIONS OF THE COURT

The court, after further consideration, concludes that there is not sufficient evidence to establish liability of Clay County for unconstitutional overcrowding or food service. There is no substantial evidence that the plaintiff herself suffered any injury as a result of either overcrowding or inadequate food service. Plaintiff was incarcerated for slightly over one and one-half months. Her primary complaint resulted from the alleged rape and the other claims against Clay County appear to be merely attempts to avoid abandonment of her unfounded rape claim against Clay County as opposed to the

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[39] These facts are addressed earlier in this Memorandum Opinion.

[40] These facts are addressed earlier in this Memorandum Opinion.

[41] According to Toland, these additional conditions are not con-tained in the Complaint, were not proven to be serious medical concerns, and were never connected to Sheriff Toland.

[42] Toland relies generally upon *Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003).

alleged culprit. All claims against Clay County will be dismissed, with prejudice.

For similar reasons, the overcrowding and food service claims against Toland will be dismissed, with prejudice. Further, the court concludes that the deliberate indifference to medical needs claims against Toland are due to be dismissed either because of lack of knowledge by Toland or because of qualified immunity. In addition, there appears to be insufficient evidence of serious medical needs other than as related to the alleged rape for which plaintiff received prompt attention. It appears that plaintiff has merely attempted to add lagniappe to what may be a serious rape claim in order to aim for target defendants.

This 15th day of September 2003.

/s/ Robert B. Propst
ROBERT B. PROPST
Senior United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[Filed Oct. 30, 2003]

CV 01-PT-3047-E

BILLIE RENEE BAILEY

Plaintiff,

v.

CLAY COUNTY, ALABAMA; RALPH TOLAND

Defendants.

ORDER

This cause comes on to be heard on plaintiff's Motion to Alter, Amend or Vacate Judgment filed on September 30, 2003. The motion is DENIED.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[Filed Dec. 9, 2003]

CV 01-PT-3047-E

BILLY RENEE BAILEY

Plaintiff,

v.

FRANK THREAT

Defendant.

FINAL JUDGMENT

In accordance with Special Jury Verdicts returned on December 9, 2003, judgment is entered in favor of the defendant Frank Threat. The plaintiff's claims against defendant Frank Threat are DISMISSED WITH PREJUDICE. Each party to bear own costs.

DONE and ORDERED this the 9th day of December, 2003.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[Filed Dec. 22, 2003]

Civil Action No: CV-01-PT-3047-E

BILLY RENEE BAILEY,

Plaintiff,

v.

FRANK THREAT,

Defendant.

PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, MOTION TO ALTER, AMEND OR VACATE JUDGMENT[1]

COMES NOW, the Plaintiff, Billie Renee Bailey, by and through her attorneys, and submits this her renewed motion for judgment as a matter of law, or in the alternative, motion to alter, amend or vacate judgment, pursuant to Fed.R.Civ.P. 50 and 59. As grounds therefore the Plaintiff shows into the Court as follows:

1. The Defendant, Frank Threats, was required under the Due Process Clause to provide the basic necessities to the Plaintiff while she was incarcerated in the Clay County Jail. The Defendant was also to refrain from acting with deliberate

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[1] The original motion for judgment as a matter of law and the final judgment entered December 9, 2003 are attached hereto.

indifference to the Plaintiff's health and safety. The undisputed evidence clearly established that the Defendant failed to do so. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Hudson v. McMillion*, 503 U.S. 1, 8 (1992).

2. The Defendant was required under the Due Process Clause to provide reasonable protection to the Plaintiff while she was incarcerated. The undisputed evidence clearly establishes that the Defendant failed to do so. *Newman v. State of Alabama*, 583 F.2d 1320, 1331(5th Cir.

Denied 1-8-04
RBPropst AL SDJ
Jury found consent.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed March 16, 2005]

Nos. 03-16171-AA & 04-10252-AA

BILLY RENEE BAILEY,
Plaintiff-Appellant,

versus

CLAY COUNTY, ALABAMA, *et al.*,
Defendants,

FRANK THREAT, Jailor of Clay County,
individually and in his official capacity,
Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC
(Opinion, 11th Cir., 19__,__F.2d__.

BEFORE: CARNES, HULL and COX, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

APPENDIX H

[AMENDMENT VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[AMENDMENT XIV]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

§ 11-12-15. Preferred claims and order of their priority; payment of same.

(a) The following claims are declared to be preferred claims against the county, and they shall be given priority in the order named:

(1) Costs of heating the county jail, of supplying it with wholesome water for drinking and bathing, of keeping it in a cleanly condition and free from offensive odors and of providing it with necessary water closets and dry earth, beds, bedding and clothing; fuel; water; light; janitor's services of the courthouse and jail; premiums for fire insurance on the public buildings of the county; and premiums on surety bonds of public officers where authorized by law to be paid by the county.

§ 11-14-13. Construction and arrangement of county jail.

The county jail must be of sufficient size and strength to contain and keep securely the prisoners which may be confined therein and must contain at least two apartments, properly ventilated so as to secure the health of those confined therein; one for men and one for women.

§ 14-6-1. Legal custody and charge of jails and prisoners; appointment of jailer.

The sheriff has the legal custody and charge of the jail in his county and all prisoners committed thereto, except in cases otherwise provided by law, and may appoint a jailer for whose acts he is civilly responsible.

§ 14-6-7. Removal of prisoners—When made to nearest sufficient jail.

If the jail of any county is destroyed, or becomes insufficient or unsafe, or an epidemic dangerous to life is

prevalent in the vicinity or there be danger of rescue or lawless violence to any prisoner, any circuit court judge may, on the application of the sheriff and proof of the fact, direct the removal of any prisoner or prisoners to the nearest sufficient jail in any other county; and it is the duty of such judge, in such case, to make an endorsement on the order or process of commitment, stating the reason why such removal is ordered, and to date and sign such endorsement.

§ 14-6-41. Supervision.

(b) The county commission of each county shall supervise the feeding of all prisoners in the county jails over which it has jurisdiction.

§ 14-6-95. Jails, etc., to be kept clean, etc.

The sheriff, chief of police, town marshal or other keepers of jails or prisons or the keeper or manager of the almshouse shall keep their respective jails, prisons and almshouses in a clean and sanitary condition, shall use every means and effort to prevent spitting on the floors and the walls of the jails, prisons and almshouses and shall exercise every precaution to prevent the spread of disease among the inmates.

§ 14-6-97. Duty of sheriff, etc., as to food.

The sheriff, the chief of police or town marshal or the keeper or manager of the almshouse shall see that the food for the inmates of the jail, prison and almshouse, respectively, is nutritious, clean, wholesome and of sufficient quantity and variety and shall have all kitchens where food is prepared for the inmates adequately screened against flies.

§ 22-3-5. County health officers—Duties generally.

It shall be the duty of the county health officer:

(3) To visit all jails, whether county or municipal, and to make careful investigation as respects the drinking water, food, clothing and bedding supplied to prisoners

and as to the ventilation, air space, heating and bathing facilities, drainage, etc., of these institutions; and, when any of said supplies are found to be inadequate in quantity or deficient in quality or any of said conditions insanitary, the county health officer shall make in writing a report thereof to the judge of probate and the county commission or the proper municipal authorities, as the case may be; whereupon, said judge of probate and county commission, or the proper municipal authorities, as the case may be, shall carry out whatever recommendations are made by the county health officer, and said health officer shall forward duplicates of his reports to the state health officer. In the event of failure of compliance with said recommendations, it shall be the duty of the proper state authorities to take appropriate action.

He shall visit, as the need dictates, all places where the public gathers and the county courthouse and any other public building belonging to the county; should he find insanitary conditions existing, he shall report the same to the county commission, and the county commission shall remedy the insanitary conditions in accordance with the recommendations of the county health officer.

APPENDIX J

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 04-1688

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

BILLY RENEE BAILEY,

Petitioner,

v.

CLAY COUNTY, ALABAMA,
SHERIFF RALPH TOLAND and
FRANK THREATS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S CONTENTION THAT ALL SEXUAL INTERCOURSE BETWEEN A JAILER AND AN INMATE VIOLATES THE FOURTEENTH AMENDMENT (DESPITE EVIDENCE WHICH THE JURY APPARENTLY CREDITED THAT THE INMATE INITIATED THE CONTACT AND PLANNED TO USE THE CONTACT AS A BASIS TO MANIPULATE THE JAILER) PRESENTS A BASIS FOR GRANTING THE WRIT AND TO OVERTURN A JURY VERDICT IN FAVOR OF RESPONDENT THREATS?

II. WHETHER PETITIONER'S CONTENTION THAT THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT SHE HAD FAILED TO CREATE A GENUINE ISSUE OF FACT AS TO HER JAIL CONDITION CLAIMS AGAINST RESPONDENTS CLAY COUNTY AND RALPH TOLAND PRESENTS A BASIS FOR GRANTING THE WRIT?

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STATEMENT OF THE CASE

Course of Proceedings Below

Respondents have no objection to Petitioner's "Course of Proceedings Below" found on pages 3-4 of her Petition.

Statement of Facts

Petitioner Billy Renee Bailey was incarcerated in the Clay County Jail several times during the latter part of 1999. The claims made the basis of her Complaint in the instant case, however, originate from her incarceration in the Clay County Jail on November 30, 1999 on charges of reckless endangerment and menacing, as a result of shooting a rifle at her husband. *See* R1-86-Ex. 15. Bailey was released on January 18, 2000 after pleading guilty to those charges.

I. FACTS WITH RESPECT TO ALLEGATIONS AGAINST RESPONDENT FRANK THREATS (ALLEGED SEXUAL ASSAULT).

Threats began work at the Clay County Jail in September 1998. R3-134-31. In December 1999, he worked the evening shift from 8 p.m. until 8 a.m. four nights a week. He was off the other three days of the week. R3-134-32, 37. He first met Bailey during the second time she was incarcerated in the jail. R3-134-50. During the nights of December 2nd, 3rd, and 4th, Threats had short conversations with Bailey wherein she asked him questions about his family, his military career, and jailer schedules. R3-134-36. During those conversations, Bailey asked him if he would like to be with her and if he would "f_ _ _" her. R3-134-34, 50. Each time prior to December 5, 1999, Threats told Bailey no. R3-134-38, 50. In addition to the sexually explicit comments Bailey made to Threats, she also exposed herself to him through a tray hole in her cell door. R3-134-38, 39, 50, 51.

On the night of December 5, 1999, Threats came to work at 8 p.m. R3-134-32, 39. While he was distributing the medications to the inmates, Bailey was calling out to him saying that she wanted him and that she wanted to "f_ _ _" him. He told her he would have to think about it. Later, after giving out all the medications, Threats got the key to Bailey's cell and unlocked her cell door Bailey mouthed the word "where" and he pointed toward the office. Bailey and Threats then proceeded to go across the hall into the bathroom in the office where they had sex. R3-134-41 to 43. Afterward, Threats walked with Bailey back to her cell and shut her door. Bailey then turned and looked at Threats, pointed her finger at him and said, "see this, this is you and I. I'm going to own you." R3-134-43, 54. This entire episode lasted approximately eight to ten minutes. R3-134-53.

Threats testified that Bailey came out of her cell of her own free will. She never told him she did not want to come out. She never told him she did not want to have sex with him. She never told him she had changed her mind. According to Threats, Bailey was alert during this whole episode. R3-134-53 to 54.

Bailey's cell was located downstairs in the jail approximately three feet away from the office door and about three and one-half feet from the entrance door to the jail. R3-134-26 to 27. The jail was small, housing only 26 inmates, including males and females. R3-134-27. The trusties' cells were also located on the first floor of the jail. The trusties have privileges that allow them to go in and out of their cells provided they stay in the building. R3-134-28 to 29. The jail is a block building so everything echoes throughout the building. R3-134-28.

Threats testified that he knew he was to have no physical contact with the inmates. R3-134-33. He knew that if he had sex with Bailey and someone found out, he would lose his job. R3-134-55. When he was first questioned as to whether he had sex with Bailey, Threats

denied it. R3-134-25, 45 to 49. Later, he admitted having had sex with her and was terminated. R3-134-25, 26, 47, 55. He testified that he initially denied it because he was embarrassed and did not want to lose his wife or ruin his military career. R3-134-45, 47, 48, 55. Threats knew what he had done was wrong. R3-134-45.

On the afternoon of December 6, 1999, Deputy Jean Alexander (now the Sheriff of Clay County), was called to the jail to talk to Bailey. R3-134-21. Bailey initially reported to Deputy Alexander that "he is in me" and that she "smelled him." R3-134-21, 22. Upon further investigation by Deputy Alexander, Bailey stated that she felt pressure in her vaginal area and that she heard her cell door open during the night. R3-134-30. Deputy Alexander then took Bailey to the Clay County Emergency Room where a rape kit was done. R3-134-21, 22.

Bailey testified at trial that she did not recall any of the events on the night of December 5, 1999, other than being given some tea with or after she was given her medication. R3-134-88, 104. She testified that on December 6th, she woke up in the afternoon and could tell that she had been penetrated. R3-134-88.

Leonard Riley was in the Clay County Jail in December 1999, when Bailey was incarcerated. At that time, he was on work release. R3-134-136. Riley testified that while incarcerated, he had conversations with Bailey wherein she told him that she had sued another law enforcement agency and had received money as a result. R3-134-137 to 139. Bailey told Riley that she had a plan in effect to try and get money out of Clay County by "throwing herself at" (seducing) one of the jailers. R3-134-139 to 140, 145. She told him she was going to "bring the place down" (referring to the Clay County Jail). R3-134-144.

On the morning Riley testified at trial, he had a conversation with Bailey prior to going into the courthouse. At that time, Bailey told him she was going to bring

this place (Clay County Jail) down, just like she said she was going to do. R3-134-140.

The jury was given the following special interrogatories to answer following the trial: Question 1 – Do you find that the Plaintiff Bailey proved by a preponderance of the evidence that she is entitled to recover on her federal claim that the Defendant Threats engaged in sexual intercourse with her by force, intimidation, or while she was not consciously aware of his conduct and without her consent? The jury answered the question no. R3-134-182 to 183. Question 2 – Do you find that the Plaintiff Bailey proved by a preponderance of the evidence that she is entitled to recover on her state law claim that Defendant Threats committed an assault and battery on her by touching her person in rudeness or anger or in a hostile manner by engaging in sexual intercourse with her, without her consent? The jury also answered no to this question. R3-134-183. A verdict was then entered in favor of Threats. R3-134-183.

At the outset of the trial, Petitioner's counsel submitted suggested jury charges as ordered by the Court. None of these suggested charges discussed how consensual sex between a jailer and inmate has constitutional implications based on the jailer's position of authority or special relationship with the inmate. Further, Bailey's counsel did not clearly state her request that such a charge be given during the charge conference held before the district court and outside the presence of the jury. R3-134-120 to 133.

II. FACTS RELEVANT TO RESPONDENTS CLAY COUNTY AND RALPH TOLAND.

Clay County Jail Facility

The Clay County Jail, located in Ashland, Alabama, was constructed in 1948. Extensive renovations were conducted on the jail in 1986, including the addition of a

new kitchen and food storage area, additional jail space, and a trusty dormitory. Additional renovations were made between 1991 and 1995, during Sheriff Toland's administration, including the refitting of the cell locking mechanisms by Federal Corrections Institute, the addition of a bathroom for use by trusties, and the addition of a storage facility for the storage of uniforms, personal property, work release clothing, files, and other paperwork. Throughout the years, general maintenance, such as painting, replacement of fixtures, and purchasing new mattresses and linens, has been done on a continual basis. In fact, the entire jail, including showers, was painted about two times each year to keep the facility clean and maintained. *See* R1-86-Ex. 1, ¶ 17 and Ex. 3, ¶ 24.

The Petitioner was housed in Cell #1, a large cell used to house female inmates in the downstairs portion of the jail. Cell #1 has two bunk beds, a shower, a toilet, and a sink. There is a catwalk behind the Cell and a large window on the other side of the catwalk. *See* R1-86-Ex. 3, ¶ 23. Also located downstairs are Cells #2 and #3; a Holding Cell, an administrative cell used for high security inmates and potentially suicidal inmates (including intoxicated inmates); the trusty dormitory and bathroom; and the kitchen.

Jail Administration and Policies and Procedures

Sheriff Toland had no personal participation in the day-to-day operations or activities of the Clay County Jail. *See* R1-86-Ex. 1, ¶ 15. Rather, Sheriff Toland appointed a Jail Administrator, Jim Studdard, to oversee the daily functioning and operation of the jail facility. *Id.* As Jail Administrator, it was Studdard's responsibility to oversee and conduct the day-to-day operation of the jail. *See* R1-86-Ex. 3, ¶ 4.

At the time Jim Studdard became Jail Administrator, there was in place a Standard Operating Procedure, which

was given to all jailers for their review. *See* R1-86-Ex. 3, ¶ 3 and Ex. 11. A copy of the Standard Operating Procedure was kept in the jail at all times. *Id.* The policy and procedure was approved by Sheriff Toland. *Id.*

Sheriff Toland was not aware of Bailey's complaints about conditions at the jail until he received a copy of the Complaint. Of course, he was informed about the alleged rape soon after the incident was supposed to have occurred. R1-86-Ex. 1, ¶ 2. Toland never received any complaint from Bailey, either written or verbal, concerning any condition within the jail that was causing her to suffer in any way or causing any problems. R1-86-Ex. 1, ¶ 3. According to Bailey, she never talked to Toland. *See* R1-86-Ex. 24, pp. 54, 152-53. If *any* of the inmates had concerns about basic sanitation or comfort, they were not telling him about it. R1-86-Ex. 1, ¶ 3. Toland did not receive any requests, either written or verbal, complaints or grievances concerning any alleged denial of medical treatment for Bailey. As far as Sheriff Toland knew, Bailey was getting the treatment she needed. *Id.*

Clay County Commission and Efforts to Build New Jail

Lou Ann Hanners has served as the county administrator for Clay County, Alabama since April 1997. In her capacity as county administrator, she is familiar with the budget for both the Clay County Sheriff's Department and the Clay County Jail. The budgets for the Clay County Jail have increased every year since Ms. Hanners has been county administrator. If ever the Sheriff's Department exceeded its budget for a particular line item, such as cleaning supplies for the jail or medical care for inmates, those line items would be adjusted upwards to meet the need. *See* R1-86-Ex. 4, ¶ 5.

The Commission, realizing its duty to "fund the [jail] facility, build a new one or [renovate the] existing [jail],"

sought to "enhance revenue" through local acts from Montgomery, as the Commission does not have taxing powers within itself. *See* R2-96-Ex. 34, p. 70. In 1996, the Commission undertook to obtain finances for the building of a new jail with such funding to come from additional court costs, a two-cent gasoline tax, and tobacco tax. *Id.*

In February 2000, certain county officials began exploring the possibility of purchasing the Russell Corporation Building, a large vacant commercial building in Ashland. In October 2000, the County Commission gave authority to the Chairman and County Administrator to negotiate the purchase of the Russell Corporation Building to convert it into a new county jail as well as offices for the Sheriff, the adult probation officers and the County Commission. An agreement was reached in the summer of 2001. The jail portion of the building was occupied in July 2003. *See* R1-86-Ex. 4, ¶ 8.

Nevertheless, during the time in which the County Commission was working with its legislative delegation to obtain financing for a new jail, the provision of funds for ongoing maintenance at the existing Clay County Jail was budgeted as in previous years with increases in each budget. *See* R2-96-Ex. 34, pp. 109-10.

Overcrowding

According to Bailey's own testimony, she often had only one cellmate, and at times, she had the cell completely to herself. *See* R1-86-Ex. 23, pp. 124, 131. At one point, Bailey's cellmate was present just on weekends because she was on work release. *Id.* at 131, 132. Early in her deposition, it appears that Bailey testified that the most cellmates she ever had at one time was three, and this apparently was for one night only. *See* R1-86-Ex. 24, p. 106. Later, she testified that there had been four or five other women in the cell but only for one weekend. *Id.* at 206-07. Other than one night (during an earlier incarceration)

when Bailey was in the administrative segregation cell (which has no bunk), Bailey had her own bunk every night. *Id.* at 205-06. Bailey was given a mattress and sheets for her bed. *Id.* at 179. Nowhere in the deposition does she attribute any injury to the alleged overcrowding.

Kitchen/Food Service

Bailey felt that the food at the jail was "inedible": too salty, foreign objects were sometimes present and there was not enough variety. Bailey alleges she tired of peanut butter sandwiches and bologna sandwiches. *See* R1-86-Ex. 24, pp. 114-16. Because she did not like what the jail was serving, at one point she just "quit eating," that is, until Mr. Buddy in the kitchen became concerned about her and began to make her grilled cheese sandwiches. *Id.* at 118. Eventually, she quit eating those as well. *Id.* at 119.

It is the policy of the Clay County Jail to provide three well-balanced meals each day to inmates. It was the responsibility of trusties to perform duties such as meal preparation and the cleaning of the kitchen.

State Health Inspector Rusty Miller personally inspected the Clay County Jail kitchen facility on December 22, 1999. The kitchen inspection yielded a score of 89, which is an acceptable rating. During this inspection of the jail kitchen, Miller noted no deficiencies in the food; food protection; personnel (hygiene); water; sewage; garbage and refuse disposal; insect, rodent, animal control; the ventilation within the kitchen; dressing rooms and other miscellaneous areas. Further, Miller noted no problem whatsoever with any presence of insects or rodents in the kitchen area. *See* R1-86-Ex. 5, ¶¶ 10, 11.

Clay County Jail Medical Care/Medication Policy and Procedure

It is the policy of the Clay County Jail to provide prompt medical attention upon any inmate's written or verbal request for medical treatment. Upon such a request, the jail staff will immediately have the inmate transported to the emergency room if it is an emergency situation or, for non-emergency complaints, Jail Administrator Jim Studdard would be notified such that he could make the first available appointment with the appropriate physician. It is also the policy of the Clay County Jail to provide any and all medications brought with the inmate to the jail or as prescribed by physicians during the inmate's incarceration. *See* R1-86-Ex. 1, ¶ 5 and Ex. 3, ¶ 5.

To the best of both Sheriff Toland's and Jail Administrator Studdard's knowledge, each and every time the Petitioner requested medical attention or was prescribed medication, such medical treatment and/or medication was provided. *See* R1-86-Ex. 1, ¶ 5 and Ex. 3, ¶ 5. As it was Sheriff Toland's policy to provide prompt medical attention to any inmate requesting the same, whether in an emergency or non-emergency situation, any denial of medical care to an inmate would have been a violation of the policy. *See* R1-86-Ex. 1, ¶ 16.

Medical Care Received by Petitioner While Incarcerated

The record is replete with examples of the medical care and attention received by Petitioner from jail staff when she was in need of medical care or requested medical care. Although Petitioner was treated medically for a variety of complaints, Petitioner's only allegation in her Amended Complaint concerning an alleged denial of medical care is: Respondents' alleged failure "to provide adequate medical care to the Plaintiff when she miscarried a few days later [after becoming pregnant], resulting in

serious consequences to her health [and] [s]everal months later, she underwent surgery as a result of the health problems created thereby." *See* R1-27-¶ 13. Details of the treatment Petitioner received as a result of her alleged sexual assault are set out below.

A. December 6, 1999

On the afternoon of December 6, 1999, Petitioner asked Jailer Josh Gregg to arrange for Petitioner to see Investigator Jean Dot Alexander because she could "smell . . . semen" when she urinated. *See* R1-86-Ex. 23, pp. 148-149. Investigator Alexander came to the jail to meet with Petitioner, who stated that "someone had had sex with [her]." *Id.* at 149. Investigator Alexander then "began [an] investigation into the incident . . . [and] transported Bailey to the Clay County Hospital . . . ." R1-27-¶ 11; R1-86-Ex. 23, p. 150.

Petitioner alleges that she could not remember anything about the incident until the next day and believes she was drugged because she had "no memory" and when she "talked to [her] mama [she] couldn't talk to her good. [Her] speech was slurred." R1-86-Ex. 23, pp. 149-50, 158-59. To the contrary, however, is the ER doctor's physical exam notation on the Petitioner, which reads "NAD [no apparent distress], alert, speech is clear." R1-86-Ex. 21(a). This and other Emergency Room records (Physicians' Records; Nursing Triage and Assessment Form) are devoid of any mention by Petitioner of being "drugged," no drug screen was ever ordered by doctors, and Petitioner admits that no one has ever confirmed such allegation. *Id.*; R1-86-Ex. 23, p. 158.

Pursuant to an allegation of sexual assault, the hospital performed a series of tests, including a urine HCG pregnancy test and a Rape Information Kit. *See* R1-86-Ex. 21(a). As the urine HCG test was positive, a serum, or

blood, HCG test (Beta-HCG) was also conducted to determine the level of the HCG, or pregnancy, hormone. The chemistry results for the Beta-HCG test was one (1), which is negative.[1] As Petitioner had already been released from the hospital and transported to the Clay County Jail, a nurse contacted the jail at 6:55 p.m. that same evening to inform Jailer Leroy Brown of the pregnancy test results, specifics about her medication and that she should be seen by "her OB doctor ASAP." *Id.*

Human chorionic gonadotropin (HCG) is made by the joining of egg and sperm after sexual intercourse. Current serum and urine testing for HCG is performed by testing for one-half of this hormone that is known as the beta subunit, thus creating the term Beta-HCG. Because other proteins can masquerade as Beta-HCG, this test can be falsely positive. The usual range for a false positive test is 5-25 IU/ml. As this patient's level was never higher than one, her test was never even high enough to be considered a false positive; it was always considered to be negative. The standard of care for most medical facilities regarding Beta-HCG tests is that any test with a level of less than 5 is considered negative; obviously, therefore, the Clay County Hospital gave the patient the benefit of the doubt; that is, they went the extra mile, in even considering the possibility that the patient could be pregnant. *See* R1-86-Ex. 27.

Later that same night, at 10:15 p.m., Petitioner was readmitted to the hospital with her chief complaint being "R/O [rule out] ectopic pregnancy." *See* R1-86-Ex. 21(b). Apparently, Petitioner was concerned about an ectopic pregnancy as she had undergone a tubal ligation (tubes tied) and, as indicated under her "past medical surgical history" previously had a tubal (or ectopic) pregnancy prior to the time of her tubal ligation. *See* R1-86-Ex.

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[1] A Beta-HCG level of less than 5 is considered a negative test for pregnancy. *See* R1-86-Ex. 27.

21(a). Because of the Petitioner's complaint of another possible ectopic pregnancy, an ultrasound was performed and the radiology report indicated "[n]o evidence of intrauterine pregnancy identified" but did not rule out an ectopic pregnancy because it may have been too early to make such a determination. *See* R1-86-Ex. 21(b). As a result, Dr. Andrews, the attending emergency room physician, informed Petitioner to "return for beta HCG every 2 days with repeat evaluation by ER doctor." *Id.* On December 10, 1999, it was decided that no further treatment was required.

On the pelvic ultrasound performed on December 6, 1999, the uterus, fallopian tubes and ovaries were all evaluated. In the ultrasound of someone in early pregnancy, the lining of the uterus would be thickened, and sometimes have a small clear space called a gestational sac. There should also be a small ovarian cyst measuring 2-3 centimeters. This small cyst, called the corpus luteum, produces hormones to support the pregnancy in its early stages. Neither of these findings was seen, and in fact, the lining of the uterus or endometrial strip was "thin with no evidence of focal thickening or fluid seen." Again, indicating no pregnancy. *See* R1-86-Ex. 27.

The production of Beta-HCG begins after the sperm and the egg have been together for about three days. Five to seven days after they join, they implant into the wall of the uterus and secrete Beta-HCG in the bloodstream. Therefore, this level is not detectable until implantation occurs. It would be impossible for a sexual encounter yielding a pregnancy to have a blood level of Beta-HCG within twelve hours. Therefore, if Petitioner was pregnant (although her Beta-HCG and ultrasound clearly suggest otherwise) it would *not* have occurred from any sexual contact on the night of December 5, 1999. *See* R1-86-Ex. 27.

B. December 7, 1999

The following day, December 7, 1999, the jail staff was contacted by Petitioner's general physician, Dr. Durant, regarding a report from the Petitioner's mother that she was "spotting (bleeding) and that she had been confirmed pregnant."[2] Dr. Durant requested that she be transported to "*our* [Dadeville] ER." *See* R1-86-Ex. 22. However, when Petitioner was advised by the jail staff that Dr. Durant requested her transport to the Dadeville emergency room, she refused to go. *Id.* An incident report of her refusal to be transported by Clay County to the Dadeville ER was documented by jail staff. *Id.* The records reflect, and Petitioner's testimony supports, that no medical requests were made by Petitioner on this date, nor did Petitioner make known to jail staff any problems she was having.

C. December 8, 1999 and December 10, 1999

As ordered by Dr. Andrews, on December 8, 1999, jail staff returned the Petitioner to the emergency room for a third Beta-HCG test, which, again, indicated a Beta-HCG of one (1). *See* R1-86-Ex. 21(c). An Outpatient Services Request was completed per orders of the Emergency Room physician, Dr. Smith, for the Petitioner to return two days later, on December 10, 1999, for a Beta-HCG test. *Id.* Again, in compliance with the original physician's orders, said staff returned Petitioner two days later on December 10, 1999 for a serum pregnancy test. Petitioner's Beta-HCG level on this date was zero (0). *Id.* No further instructions regarding testing were given by the physician or LPN on this date. *See* R1-86-Ex. 21(d).

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[2] Interestingly, the medical records from the Clay County Hospital for Petitioner's December 8 and December 10, 1999 visits include no mention whatsoever of any problems with "spotting" or "bleeding" as alleged by Petitioner's mother to Dr. Durant, and subsequently to the jail staff, on December 7, 1999. *See* R1-86-Ex. 21(c)-(d).

Undisputed Medical Testimony re: Petitioner's Alleged Miscarriage

Dr. Sharma, based on the medical documentation, opines that the Petitioner was, in fact, never pregnant. Thus, Petitioner never miscarried. Additionally, Petitioner's own testimony evidences a regular or normal menstrual cycle.

Given the information from the Emergency Room on December 6, 1999, it is doubtful that the patient was pregnant. Beta-HCG, which is a hormone made by a pregnancy three days after intercourse and found in the bloodstream 5-7 days after intercourse producing a pregnancy, was found at a level of one (1). This is consistent with a negative serum pregnancy test, in accordance with the guidelines of most medical centers. Because of the timing of the production of Beta-HCG, it would not be found in the bloodstream twelve hours after intercourse producing a fertilized egg. Further, a pelvic ultrasound performed after the patient's first visit to the ER on December 6, 1999, for which she was taken by her jailers as directed by the hospital, did not show any findings consistent with pregnancy. *See* R1-86-Ex. 27. Consequently, Petitioner had no miscarriage.

REASONS FOR DENYING THE WRIT

Petitioner has presented no basis whatsoever for the granting of her writ of certiorari to the Eleventh Circuit Court of Appeals. She has made no attempt in her petition to justify its granting based on the grounds set cut in Rule 10 of the Rules of the Supreme Court of the United States. There is no basis for this Court to conclude that the Eleventh Circuit's ruling is in conflict with other circuits, that its ruling decided an important federal question in a way that so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court.

The Court will note that this Opposition rarely mentions the Eleventh Circuit Opinion because that Opinion – well-reasoned and supported in both the law and the factual record – is hardly mentioned in Bailey's Petition.[3] Since her primary attack is on the district court's ruling, the Respondents have spent the majority of their Opposition in defending that ruling.

I. THE PETITIONER HAS NOT PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI WITH RESPECT TO THE JURY VERDICT IN FAVOR OF RESPONDENT FRANK THREATS.

Petitioner, based on her own testimony, was able to get her claim of sexual assault by Jailer Frank Threats to a jury. That jury, however, quickly saw through Petitioner's canard and as trier of fact found the issues in favor of Threats. The jury clearly believed Threats' testimony that Bailey had seduced him in an effort to "own him" – that is, use his misdeed as a tool to exercise influence over him. Clearly, such a scenario presents no constitutional violation and the trial judge properly instructed the jury. Any objection by Petitioner to the jury charges given was waived anyway. No basis for the granting of a writ of certiorari exists.

A. Bailey Failed To Properly Preserve For Appeal Her Objection To The Jury Instructions.

Rule 51 of the Federal Rules of Civil P[illegible]cedure provides that: "A party who objects to an instruction or the

[3] Petitioner quotes a paragraph from the Opinion on page 19 but never really challenges it. The contention that the Eleventh Circuit erroneously ruled that Bailey waived any objection to the jury charges (also on page 19 at n. 15) is addressed above.

failure to give an instruction must do so on the record, *stating distinctly the matter objected to and the grounds of the objection.*" The Eleventh Circuit, stressing the phrase "stating distinctly," has refused to depart from this rule except in the most narrow of circumstances, i.e., "when an error is so fundamental as to result in a miscarriage of justice or when the district court's instruction amounts to plain error." *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1394 (11th Cir. 1997) (quoting *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1533 (11th Cir. 1987)). Applying this law to the facts of this case, the trial court is due to be affirmed because Bailey failed to state distinctly her grounds for objection and because the failure to give the instruction sought by Bailey on appeal did not result in fundamental error or a miscarriage of justice.

In the trial court's charge conference, Bailey's counsel made two primary objections. First, he complained that the charges "did not contain anything in them about due process and the standard." R3-134-121. Second, he complained (at length) that references to "intercourse" in the charges were not preceded by the adjective "unlawful."[4] R3-134-123 to 126.

Nowhere in the trial court record, however, does one find any "distinctly stated" request for the jury to be charged on the question of whether Respondent Threats and Bailey had a "special relationship" due to Threats' "position of authority" – the focus of Bailey's appeal. *See* Petitioner's Brief before Eleventh Circuit, p. ix ("Were the jury charges given by the trial court inadequate since the instructions did not specify that Appellee Threats was in a position of authority, or rather a special relationship, over the Appellant?"). In other words, although there was

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[4] Both these objections were overruled and neither were asserted as grounds for reversal in Bailey's brief before the court of appeals. Consequently, Bailey has waived any possible error.

some general discussion of "the circumstances of jailer/inmate" and Threats' "obligation to protect the health and safety of . . . an inmate under his control," it was all in the context of whether "unlawful" should be used to describe "intercourse." *See* R3-134-121, 124. Bailey's counsel never directly asked the Court for an instruction characterizing voluntary sex between an inmate and jailer as abuse of authority or special relationship and, therefore, a constitutional violation.[6] Obviously, the district court cannot be reversed for denying an instruction that was never clearly articulated and requested. *Heath*, 126 F.3d at 1394 (overruling challenge to jury charges and explaining that "there is no indication in the record that [plaintiff] ever asked the trial court for a ruling on these legal issues or that the trial court was ever aware of the need for such a ruling."); *McClow v. Warrior & Gulf Nav. Co.*, 842 F.2d 1250, 1253 (11th Cir. 1998) (stating "it must be clear that the trial judge understood the party's position").

B. Bailey Was Not Entitled To A "Special Relationship"/"Position Of Authority" Charge.

Even if Bailey's counsel had clearly articulated a request for a "special relationship"/"position of authority" instruction, it would not have been error (much less reversible error) for the district court to refuse such a request. Although there appears to be no mandatory authority directly addressing the constitutionality of consensual sex between jailer and inmate, certain language in *Parker v. Williams*, 862 F.2d 1471, 1474 (11th Cir. 1989), *overruled on other grounds by Turquitt v. Jefferson*

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[6] None of Bailey's requested jury instructions (which were rejected by the district judge below) discuss the "special relationship"/ "position of authority" theory of liability advocated by her appellate brief. *See* R3-134-131, Court's Exhibit One to the Trial Transcript.

County, Ala., 137 F.3d 1285 (11th Cir. 1998) (en banc) and the holdings of other federal courts suggest that such intercourse, although worthy of condemnation, is not unconstitutional.

The Eleventh Circuit in *Parker v. Williams* peripherally addressed the defense of consent in a jail rape context. Sheriff Amerson defended the liability claim against him on the basis that his jailer's alleged rape of an inmate was, in reality, consensual sex.

> Sheriff Amerson attempted to introduce evidence at trial showing that there was no physical violence during the rape and that there was voluntary foreplay leading up to the rape. These facts are relevant to a jury's finding that Williams actually committed rape. The district court denied admission of this evidence based on the doctrine of collateral estoppel. The district court held that Williams' criminal conviction in Alabama state court in 1984 for kidnapping and rape collaterally estopped all defendants from challenging the fact of the rape in the civil action.

Parker v. Williams, 862 F.2d at 1474. Unfortunately (for purposes of the instant case), Amerson's "consent" defense was barred because, unlike in the instant case, the jailer had been convicted criminally of sexual assault. Nonetheless, the clear implication of the *Parker* language is that if the jailer had *not* been convicted of the sexual assault, the defense of consent would have been open to the constitutional claims against Sheriff Amerson.

The implicit conclusion in *Parker*, however, becomes explicit in at least five federal cases from outside the Eleventh Circuit. In *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998), the circuit court affirmed the district court's determination that "the forced act of sexual intercourse violated [the arrestee]'s due process right to be free from physical abuse or sexual assault by state actors." Similarly, in *Freitas v. Ault*, 109

F.3d 1335, 1338 (8th Cir. 1997), the circuit court affirmed the district court's conclusion that a voluntary "sexual interaction" did not state a constitutional violation. *See also Fisher v. Goord*, 981 F. Supp. 140, 174 (W.D. NY 1997); *Petty v. Venus Correctional Unit*, 2001 WL 360868, *2 (N.D. Tex. 2001) ("Without some unwanted touching or coercion by the officers, a claim of sexual harassment cannot lie under the facts of this case."); *Stockman v. Lowndes County, Miss.*, 2000 WL 33907696, *4 (N.D. Miss. 2000) ("It appears well-established that while consensual conduct may violate municipal policy, it carries no constitutional implication.").

Finally, even if (assuming for the sake of argument) mandatory authority established that a constitutional violation takes place when a jailer uses his "special relationship" with an inmate or "position of authority" to obtain consent for sex – such a principle would not fit the facts of this case. Here, there was *no* testimony that Threats suggested sex and Bailey gave in because, considering his power over her, she felt she had to go along with the idea. Bailey testified that she had no recollection of intercourse but that she might have been given a date rape drug by someone and violated in her sleep. R3-134-88, 89. Obviously, this scenario was covered by the lack of consent charge given by the district court.[6] According to Threats (whom the jury obviously found credible), it was *Bailey* who solicited sex from Threats as part of a misconceived plot to gain leverage over him. *See* R3-134-41 to 43 ("[After sex] she told me that – she pointed her finger at me and said see this, this is you and I. I'm going to own you.").

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[6] "[W]hat she alleges and has to prove . . . is that he engaged in sexual intercourse with her without her consent either by intimidation, force, or by taking advantage of her while she was not consciously aware of his conduct." R3-134-171.

II. THE PETITIONER HAS NOT PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI WITH RESPECT TO THE SUMMARY JUDGMENT GRANTED TO RESPONDENTS CLAY COUNTY AND RALPH TOLAND.

Petitioner's claims against Clay County and Sheriff Ralph Toland were frivolous and were properly stricken upon summary judgment by the district court and that order was properly affirmed by the Eleventh Circuit. No basis for the granting of a petition for a writ of certiorari exists.

A. The District Court Properly Granted Sheriff Toland Summary Judgment As To All Claims Made By Petitioner – Having Found Each Claim To Be Factually And Legally Insufficient.

In its memorandum opinion granting summary judgment to Sheriff Toland, the District Court properly concluded that Bailey presented insufficient evidence of her overcrowding and food service complaints. R2-114-26. According to the district court, Bailey simply presented "no substantial evidence that the Petitioner herself suffered any injury as a result of overcrowding or inadequate food service." *Id.* Bailey's medical care claim against Sheriff Toland was dismissed by the District Court on two independent and alternative grounds: "lack of knowledge [on the part of Toland] . . . [and] qualified immunity." *Id.* Each of these conclusions – well-supported by the record and by the law of this Circuit – is due to be affirmed.

1. Respondent Toland was entitled to summary judgment on the issue of Bailey's overcrowding claim.

Bailey's argument with respect to the overcrowding, never mentioning Toland by name, asserts that "the

Appellees were aware of overcrowding at the facility." Appellant's Brief, p. 23. This argument, however, overlooks the most prominent flaw in Bailey's overcrowding claim, which is her failure to connect the overcrowding in the male inmates' section of the jail with her own constitutional rights. In other words, even if Bailey proved *part* of the jail was exceeding its design capacity, that fact does not mean that *Bailey* suffered a constitutional deprivation as a result. Bailey has no standing to assert an alleged violation inflicted upon other inmates. *See Lewis v. Casey*, 518 U.S. 343, 347, 116 S. Ct. 2179 (1996).

According to Bailey, she often had only one cellmate, just on weekends, and at times she had the cell completely to herself. *See* R1-86-Ex. 23, pp. 124, 131-32. Although her testimony varied, at the most, Bailey was incarcerated with several women for one weekend only. *See* R1-86-Ex. 24, pp. 206-07. Nevertheless, throughout her incarceration, Bailey had her own bunk every night and was given a mattress and sheets for her bed. *Id.* at 179, 205-06. Nowhere in her deposition testimony does Bailey attribute any injury to the alleged overcrowding.

As stated more fully in the "Statement of Facts," the jail records objectively show that there was never any significant or sustained problem with overcrowding in the female cells, and, in fact, the female population declined over fifty percent from 1998 to 1999, the time during which Bailey was incarcerated. *See* R1-86-Ex. 1, ¶ 6. Although there was an increase in the male population during that same time period, this overcapacity situation in no way affected the downstairs female cells. *Id.* In fact, Health Department Inspector Rusty Miller, who inspected the jail quarterly, does not recall any problem with overcrowding in the female cell area. *See* R1-86-Ex. 5, ¶ 15.

Even if Bailey had suffered a constitutional deprivation due to overcrowding, Toland could be liable only if he knew about it and then was deliberately indifferent to that

fact. Bailey presents no evidence of such knowledge or of Toland's deliberate indifference. The fact that he knew some of the male inmates were experiencing overcrowding (which he was trying to address anyway), does not prove that he had any personal knowledge of Bailey's condition on the rare occasion she might have had more than one other inmate in the cell with her.

Not only has Bailey failed to overcome qualified immunity by stating a constitutional claim with respect to overcrowding, she has also failed to identify any clearly established law which would have put Toland on notice that his conduct toward Bailey was unconstitutional.

2. Respondent Toland was entitled to summary judgment on the issue of Bailey's food service claim.

Bailey's chief complaint concerning food is a lack of variety, although she also alleges that the food was too salty and sometimes contained foreign objects. *See* R1-86-Ex. 24, pp. 114-16. Bailey's complaints about the food simply do not rise to the level of a constitutional claim nor do they prove any deliberate indifference on the part of Sheriff Toland. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985); *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). *See also Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392 (1981); *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321 (1991). Neither has Bailey proved that Toland had personal knowledge of her complaints about the jail food but was deliberately indifferent to those complaints. Additionally, Bailey has failed to identify any clearly established law, which would have put Toland on notice that his conduct toward Bailey (with respect to jail food) was unconstitutional.

3. Toland was entitled to summary judgment on the issue of Bailey's medical care.

Bailey alleged in her complaint that Respondents failed "to provide adequate medical care to the Petitioner when she miscarried a few days [after becoming pregnant], resulting in serious consequences to her health [and] [s]everal months later, she underwent surgery as a result of the health problems created thereby." R1-27-¶ 13. As fully set forth in the "Statement of Facts," none of the record evidence supported this conclusion. Moreover, no evidence connected Toland with knowledge of her medical complaints. Appellant's argument never even mentions Toland by name.

a. Bailey has offered no competent medical evidence that she was pregnant, that she miscarried or that she suffered any "serious consequences to her health."

In order to establish a jail medical care claim, "[f]irst, a plaintiff must set forth evidence of an objectively serious medical need." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *see also Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990). Bailey has failed to clear this initial hurdle. To the contrary, Respondents have offered the only competent medical testimony in the form of an affidavit and report by Dr. Lee Sharma, a board-certified gynecologist practicing in Alabama. After examining Bailey's medical records, she concludes that Bailey was most likely never pregnant, never suffered a miscarriage and that any subsequent problems she experienced were due to a pre-existing disease and not anything that happened at the Clay County Jail (and certainly nothing related to Sheriff Toland or his policies). *See* R1-86-Ex. 27,

p. 1 of Affidavit, pp. 5-6 of Report. These opinions are unrefuted by Bailey.

b. Even if Bailey had experienced a serious medical need at the jail, there is no evidence of deliberate indifference by Toland (or any of the jail staff).

Without recounting all the medical attention Bailey received at the jail, it cannot be overemphasized that Sheriff Toland, sued in his individual capacity, can be held liable only for actions he took or policies he instituted. *See, i.e., Hardin v. Hayes*, 957 F.2d 845, 849 (11th Cir. 1992) ("Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability."); *see also Provost v. City of Newburgh*, 262 F.3d 146, 154 (2nd Cir. 2001). Yet, it is undisputed that Toland had no interaction or personal involvement with Bailey, and Bailey failed to challenge Toland's policies. Bailey's contention (before the district court) that Toland can be held personally liable for facts he did not know but "should have known" is contrary to the standard for deliberate indifference set by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). *See Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996). Even if Toland could be held liable for the medical care provided to Bailey by his staff, the care given Bailey far exceeded constitutional requirements.

4. Petitioner has offered no "clearly established law" sufficient to deprive Sheriff Toland of qualified immunity.

The burden is on the Petitioner to show that the Respondent official has violated a clearly established right and that the law was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001). Bailey has cited

no authorities justifying the denial of qualified immunity to a sheriff under these undisputed facts. *See generally*, *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987).

B. The District Court Properly Granted Clay County Summary Judgment As To All Claims Made By Petitioner – Having Found Each Claim To Be Factually And Legally Insufficient.

In general, the Constitution requires only that jail authorities provide the "minimal civilized measure of life's necessities . . . [; it] does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 347-49, 101 S. Ct. 2392 (1981). Further, deprivations must be "sufficiently grave" before they form the basis of an Eighth (or Fourteenth) Amendment violation. *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321 (1991). Bailey has failed to show that she was denied the minimal necessities of civilized life or that she experienced anything more than discomfort (if that) due to the alleged overcrowding and inadequate food service at the Clay County Jail. She has certainly shown no deliberate indifference on the part of Clay County to her condition. While it may be true, as Bailey contends, that "governments can always improve the food [and] living conditions . . . at these detention facilities by increasing funds for those facilities," it does not follow that the failure to perpetually increase funding equates to a constitutional violation. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985).

In its September 16, 2003 Memorandum Opinion granting summary judgment to Clay County, the District Court properly concluded that Bailey presented insufficient evidence of her overcrowding and food service complaints. R2-114-26. According to the district court, Bailey simply presented "no substantial evidence that the Plaintiff herself

suffered any injury as a result of overcrowding or inadequate food service." *Id.* Bailey's medical care claim against Clay County was rejected by an earlier memorandum opinion of the District Court which found no basis to hold Clay County responsible for the medical care provided at the Clay County Jail. R2-110-30, 31. Finding support both in the record and in the law of this Circuit, the District Court's granting of summary judgment to Clay County is due to be affirmed.

1. Clay County was entitled to summary judgment on the issue of Bailey's overcrowding claim.

As stated in Sheriff Toland's argument above, the most prominent flaw in Bailey's overcrowding claim is her failure to connect the overcrowding in the male inmates' section of the jail with her own constitutional rights. In other words, even if Bailey proved that *part* of the jail was exceeding its design capacity, that fact does not mean that *Bailey* suffered a constitutional deprivation as a result.

But, even if Bailey could overcome the dearth of evidence concerning how overcrowding in general caused specific constitutional violations to her, she has not offered any evidence of how Clay County knew of these specific injuries to Bailey and yet was deliberately indifferent to them. At the district court level, Bailey relied on certain Alabama Code sections apparently to make the point Clay County "should have been aware" of Bailey's overcrowding injuries (if they existed). But, such objective knowledge is insufficient to establish notice after the United States Supreme Court's ruling in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). *See Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996) (discussing *Farmer*'s standard).

To the extent that Clay County Commissioners, like John Wheeles, were aware of overcrowding in the jail, the problem was limited to the upstairs portion of the jail

where the male cells are located.[7] *See* R1-86-Ex. 34 at 23. Nonetheless, the County Commission was anything but deliberately indifferent to this knowledge. Realizing its duty to "fund the [jail] facility, build a new one or [renovate the] existing [jail]," the Commission sought to "enhance revenue" through local acts from Montgomery, as the Commission does not have taxing powers within itself. *See* R1-86-Ex. 34, p. 70.

As set out more fully in the record below, the County Commission explored numerous avenues and undertook several different methods by which to increase money for the funding of the jail or for a new jail. As the district court found below, Clay County Commission's efforts were ongoing. *See* R2-114-3, 4; *see also* R1-86-Ex. 4, ¶¶ 6-8; R2-96-Ex. 34, pp. 70, 109-10.

Bailey has failed to create a genuine issue as to whether she was injured by the overcrowding experienced in other parts of the jail, as to whether Clay County was aware of her personal injuries (which she has never proven), and as to whether Clay County was deliberately indifferent to her situation. Consequently, Clay County was entitled to summary judgment.

2. Clay County was properly granted summary judgment on Bailey's claim concerning jail food.

As stated in the argument on behalf of Sheriff Toland above, Bailey's complaints about the food simply do not rise to the level of a constitutional claim. *See Hamm v. DeKalb*

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[7] Simply because the jail was operated at excess capacity does not mean there was a constitutional violation, as long as the overflow did not lead to deprivations of food, medical care or sanitation. *See Rhodes v. Chapman*, 452 U.S. 337, 348, 101 S. Ct. 2392 (1982). Further, temporary periods of overcrowding do not implicate constitutional concerns. *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985).

County, 774 F.2d 1567, 1575 (11th Cir. 1985). Even if Bailey had proven that the jail food service somehow violated her constitutional rights, she has completely failed to establish a case for deliberate indifference. Commissioner Wheeles was never made aware of any problem with the food at the jail. *See* R1-86-Ex. 34, pp. 91, 97. Additionally, as recounted in detail in Sheriff Toland's argument above, the jail enforced policies aimed at making sure the food service was adequate and the jail received a score of 89 from a health department inspection the month Bailey was there. Bailey has utterly failed to create a genuine issue of fact concerning whether her Eighth or Fourteenth Amendment rights were violated by the jail food service or concerning whether Clay County was deliberately indifferent to her alleged violations.

3. Clay County was entitled to summary judgment on Bailey's lack of medical care claim.

In *Marsh v. Butler County*, 268 F.3d 1014, 1026 n. 6 (11th Cir. 2001) (en banc), the Eleventh Circuit, sitting en banc, when addressing a plaintiff's claim for deliberate indifference against both the county and the sheriff, noted that "under Alabama law the County is not responsible for assuring procedures are in place for inmates to get medical care." Alabama law assigns counties a "limited role in building and funding the jails." Similarly, Clay County was entitled to summary judgment on Bailey's deliberate indifference to a serious medical need claim.

a. To the extent a medical care claim has been and can be alleged against the County, Bailey has proven no serious medical need.

Assuming Petitioner alleges a claim for deliberate indifference to a serious medical need against Clay

County, such claim fails as there is no serious medical need, as set out above with respect to allegations against Sheriff Toland.

b. Even if Bailey had proven a serious medical need, she was unable to produce any evidence that Clay County was aware of that need.

While proof of a serious medical need is *necessary* for Bailey to state a constitutional claim, it is not, in and of itself, sufficient. In other words, even if Bailey produced evidence of a serious medical need, she must go further and also present evidence indicating that Clay County was aware of a serious medical need and yet ignored it. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994). There is no evidence in the record that Clay County or the Clay County Commission had any knowledge of Bailey's medical status or that she had a serious medical need for which she not getting the appropriate medical attention (if that were the case).

c. Bailey cannot produce evidence of deliberate indifference.

Since Bailey lacks proof that the County knew (or even had a reason to know) about her alleged medical conditions, there is certainly no evidence that the County demonstrated deliberate indifference to her medical needs.

CONCLUSION

Based on the foregoing, Respondents request that this Court refuse to grant the Petition for a Writ of Certiorari.

Respectfully submitted, this 17th day of August, 2005.

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